Office - Supreme Court
FILED
SEP 16 1982
ALEXANDER L. STEVAS
CLERK

No. 82-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH P. McCOMBS, Chairman,
Illinois Prisoner Review Board,

Petitioner,

vs.

WILLIAM SCOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner

MARCIA FRIEDL
TERENCE M. MADSEN
Assistant Attorneys General
Of Counsel

Printed by the Authority of the State of Illinois

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines to find a legitimate expectation of release on parole where the Illinois parole statute contains no mandatory language limiting the Illinois Prisoner Review Board's broad discretion to deny parole and where Illinois courts have squarely held that parole under the statute is a matter of executive grace and clemency.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The proceedings in the court below involved the claims of William Scott as Petitioner-Appellant and the Illinois Parole and Pardon Board and Lou Brewer as Respondents-Appellees. These were also the parties in the district court. Mr. Lou Brewer is a former warden with the Illinois Department of Corrections who no longer serves in that capacity and is not a party to this petition. The name of the paroling authority in Illinois was changed by statute, in 1978, from the Illinois Parole and Pardon Board to the Illinois Prisoner Review Board. Joseph P. McCombs is the current chairman of the Illinois Prisoner Review Board.

TABLE OF CONTENTS

	PAGE:
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS IN THE COURT BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI:	
I.	
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS INTERPRETED THE ILLINOIS PAROLE STATUTE TO CREATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN PAROLE WHICH HAS BEEN CONSISTENTLY REJECTED BY THE COURTS OF ILLINOIS AND IS CONTRARY TO THE INTENTION OF THE ILLINOIS LEGISLATURE AND THE INTERPRETATION OF THE STATUTE BY THE ILLINOIS PRISONER REVIEW BOARD ...	7

II.

THE HOLDING OF THIS CASE IS IRRECONCILABLE WITH THE SEVENTH CIRCUIT'S RECENT HOLDING IN *WELSH v. MIZELL*, AS *WELSH* RENDERED THE STANDARD ANALYZED BY THE COURT IN REACHING THE INSTANT DECISION INAPPLICABLE TO THIS PETITIONER .. 21

III.

THE PROCEDURAL HISTORY OF THIS CASE REQUIRES, AT THE VERY LEAST, A REMAND TO THE COURT OF APPEALS WITH DIRECTIONS THAT THE COURT ALLOW BOTH PETITIONER AND RESPONDENT THE OPPORTUNITY TO FULLY BRIEF AND ARGUE THE IMPORTANT ISSUES CONTAINED IN THIS CASE 23

CONCLUSION 30

APPENDIX

PAGE

A: *United States of America ex rel. William Scott v. Illinois Parole and Pardon Board*, No. 79-2131 (668 F.2d 1185) (7th Cir. 1982) 1a

B: Corrected Order denying Petition for Rehearing and Suggestion for Rehearing *en banc* 15a

C: Order denying Motion to Reconsider 18a

D: *United States of America ex rel. William Scott v. Illinois Parole and Pardon Board*, No. 79 C 860 (N.D. Ill. August 27, 1979) 20a

E: Order denying parole—August 30, 1978 ..... 24a

F: *Sanders v. Illinois Prisoner Review Board*, No. 80 C 963 (N.D. Ill. January 13, 1981) 26a

G: *Walker v. Irving*, No. 79 C 623 (N.D. Ill. October 18, 1979) 37a

H: *Burns v. Irving*, No. 80 C 337 (N.D. Ill. January 24, 1980); *Parisie v. Irving*, No. 80 C 131 (N.D. Ill. January 22, 1980) 42a

I: *Burns v. Irving*, No. 80-1429 (7th Cir. December 19, 1981) 45a

J: *Newbury v. Irving*, No. 80-2352 (7th Cir. July 23, 1981) 47a

K: Motion for Leave to Cite Additional Authority 50a

L: Pending Federal Habeas Corpus Petitions Relying on *Scott* for a Constitutional Basis 68a

M: Order denying Parole of William Witherspoon—October 13, 1977 ..... 69a

N: Constitutional and Statutory provisions involved 70a

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Anderson v. Winsett, ... U.S. ....., 101 S.Ct. 891 (1981)	14
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	22
Austin v. Armstrong, 473 F.Supp. 1114 (D. Nev. 1979)	13
Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980)	9, 11, 15
Bishop v. Wood, 426 U.S. 341 (1976)	11
Block v. Potter, 631 F.2d 233 (3rd Cir. 1980)	9, 12
Boothe v. Hammock, 605 F.2d 661 (2nd Cir. 1979)	12
Bowles v. Tennant, 613 F.2d 776 (9th Cir. 1980)	10
Burns v. Irving, No. 80 C 337 (N.D. Ill. January 24, 1980) *aff'd* No. 80-1429 (7th Cir. December 19, 1981)	25
Campbell v. Montana State Bd. of Pardons, 470 F.Supp. 1301 (D. Mont. 1979)	13
Candelaria v. Griffin, 641 F.2d 868 (10th Cir. 1981)	11
Connecticut Bd. of Pardons v. Domschat, ... U.S. ....., 101 S.Ct. 2460 (1981)	9, 13
Davis v. Ball Memorial Hospital Ass'n, 640 F.2d 30 (7th Cir. 1980)	9
Duckworth v. Serrano, ... U.S. ....., 102 S.Ct. 18 (1981)	15
Evans v. Dillahunty, 662 F.2d 522 (8th Cir. 1981)	10
Gagnon v. Scarpelli, 411 U.S. 778 (1978)	13
George v. The People, 167 Ill. 447, 47 N.E. 741 (1897)	16
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	20

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) ..... *passim*
Griffeth v. Detrick, 603 F.2d 118 (9th Cir. 1979) cert. denied, 445 U.S. 970 (1980) 14
Harris v. Irving, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980) 17
Houser v. Morris, 518 F.Supp. 873 (N.D. Ga. 1981) 12
Jackson v. Reese, 608 F.2d 159 (5th Cir. 1979) 12
Jago v. Van Curen, ... U.S. ....., 102 S.Ct. 31 (1982) 14
Johnston v. Alabama Pardon and Parole Bd., 530 F.Supp. 589 (M.D. Ala. 1982) 12
Marciano v. Coughlin, 510 F.Supp. 1034 (E.D. N.Y. 1981) 14
Martino v. Gard, 526 F.Supp. 958 (E.D. N.Y. 1981) 14
Meachum v. Fano, 427 U.S. 215 (1976) 13
Moody v. Daggett, 429 U.S. 79 (1976) 14
Morrissey v. Brewer, 408 U.S. 471 (1972) 13
Neal v. Secretary of the Navy, 639 F.2d 1029 (3rd Cir. 1981) 13
Newbury v. Irving, No. 80-2352 (July 23, 1981) 26
People ex rel. Castle v. Spivey, 10 Ill.2d 586, 141 N.E.2d 321 (1957) 17
People ex rel. Jones v. Brantley, 45 Ill.2d 335, 259 N.E.2d 33 (1970) 15, 17
People ex rel. Tucker v. Kotsos, 42 Ill. App. 3d 812, 818, 356 N.E.2d 798 (1st Dist. 1977), *reversed in part on other grounds*, 68 Ill.2d 89 (1977) 15
People ex rel. Weaver v. Longo, 57 Ill.2d 67, 309 N.E.2d 581 (1974) 15
People v. Hawkins, 54 Ill.2d 247, 296 N.E.2d 725 (1973) 15, 17

People v. Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964) 16
People v. Nowak, 387 Ill. 11, 55 N.E.2d 63 (1944) . 17
Pugiliese v. Nelson, 617 F.2d 916 (2d Cir. 1980) 14
Robinson v. Mabry, 476 F.Supp. 1022 (E.D. Ark. 1979) 12
Sanders v. Illinois Prisoner Review Board, No. 80 C 963 (N.D. Ill. January 13, 1981), *appeal pending* 16, 25
Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172 (1975) (10th Cir. 1980) 12
Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979) 12
Slocum v. Georgia State Bd. of Pardons and Paroles, 678 F.2d 940 (11th Cir. 1982) 12, 17
Solomon v. Benson, 563 F.2d 339 (7th Cir. 1977) 14
Stanton v. Wainwright, 665 F.2d 688 (5th Cir. 1981) 11
United States of America ex rel. McCalvin v. Irving, 504 F.Supp. 369 (C.D. Ill. 1980) 12
United States of America ex rel. Parisie v. Irving, No. 80 C 131 (N.D. Ill. January 22, 1980), *leave to appeal in forma pauperis denied*, No. 80-1240 (July 8, 1980), *cert. denied*, 101 S.Ct. 168 (1980) . 25
United States of America ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 915 (1976) 26
United States of America ex rel. Scott v. Illinois Parole and Pardon Bd., 669 F.2d 1185 (7th Cir. 1982) 27
Vitek v. Jones, 445 U.S. 480 (1980) 13
Wagner v. Gilligan, 609 F.2d 866 (6th Cir. 1979) .. 12
Walker v. Irving, No. 79 C 623 (N.D. Ill. October 18, 1979) 25
Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982) (Petition for Cert. pending, No. 81-2105) 21, 22

Williams v. Briscoe, 641 F.2d 274 (5th Cir. 1981) .. 11
Williams v. Missouri Bd. of Probation and Parole, 661 F.2d 697 (8th Cir. 1981) 10
Witherspoon v. Illinois, 319 U.S. 510 (1968) 20, 27
Wolff v. McDonnell, 418 U.S. 539 (1974) 13
Young v. Hunt, 507 F.Supp. 785 (N.D. Ind. 1981) . 14

CONSTITUTIONAL PROVISIONS:

Const. of Illinois (1970), art. I, sec. 11 27

STATUTES:

28 U.S.C. §2254 7
42 U.S.C. §1983 ..... 25, 26
Ill. Rev. Stat., ch. 38, §1003-3-5(c) ..... *passim*
Neb. Rev. Stat. (1976) §83-1, 114(1) 9

MISCELLANEOUS:

Transcript of the Proceedings of the Illinois Senate, May 9, 1972 ..... 18, 19
Rules of the Illinois Prisoner Review Board (1978 ed.) 16, 22
Rule 35(a), Federal Rules of Appellate Procedure 28, 29
Rule 35, Circuit Rules of the United States Court of Appeals for the Seventh Circuit ..... *passim*

In The

Supreme Court of the United States

October Term, 1982

JOSEPH P. McCOMBS, Chairman,
Illinois Prisoner Review Board,

Petitioner,

vs.

WILLIAM SCOTT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit which held that the Illinois parole statute creates a legitimate expectation of parole. *United States of America ex rel. Scott v. Illinois Parole and Pardon Board*, 669 F.2d 1185 (7th Cir. 1982). A copy of the opinion is attached as Appendix A.

On November 11, 1968, the respondent was convicted of murder in the Circuit Court of Cook County, Illinois and

was sentenced to a term of 25 to 40 years in the custody of the Illinois Department of Corrections.

He brought a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois alleging that he had been denied due process in his 1978 parole hearing. His petition was denied when the court found that the Illinois parole statute created no expectation of parole. *United States ex rel. Scott v. Illinois Parole and Pardon Board*, No. 79 C 860 (N.D. Ill. August 27, 1979). A copy of that opinion is attached as Appendix D.

The court of appeals denied the People's petition for rehearing and suggestion for rehearing en banc on June 18, 1982. See Appendix B.

JURISDICTION

The court of appeals' decision was rendered on February 9, 1982. A petition for rehearing was denied June 18, 1982. This petition is being filed within 90 days of the date the court of appeals denied the petition for rehearing as per 28 U.S.C. §2102(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Because of the length of the Statutes and Regulations involved these sections are set out as Appendix N.

STATEMENT OF THE CASE

William Scott (hereinafter referred to as respondent) was convicted of murder in the Circuit Court of Cook County, Illinois on November 11, 1968. He was sentenced to a term of 25-40 years for the stabbing death of a "companion" of his estranged wife. *See People v. Scott*, 52 Ill.2d 432, 288 N.E.2d 478 (1972), *cert. denied*, 410 U.S. 941 (1973). On August 30, 1978, the respondent appeared before the Illinois Prisoner Review Board (formerly the Illinois Parole and Pardon Board and hereinafter referred to as the Prisoner Review Board) for the second time and was denied parole for the following reason:

> The basis for the Board's decision denying you parole at this time is explained as follows:
>
> The above action is taken based on the Board's feeling that release at this time would deprecate the severity of the crime for which you were convicted, namely, Murder, receiving a 25-40 year sentence.

See Appendix E.

Following his 1978 denial, the petitioner applied for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division, alleging that he had been denied parole in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The district court (Decker, J.) considered the petitioner's claim, and a Motion for Summary Judgment filed by respondents, in light of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and found that the "Illinois statute does not

require release on parole but, rather, sets forth instances in which parole shall not be granted." Appendix D at 21a.

The court went on to hold that "Therefore, the court concludes that the Illinois statute creates no expectancy of release on parole which is protected by due process." *United States of America ex rel. William Scott v. Illinois Parole and Pardon Bd.*, No. 79 C 860 (N.D. Ill. August 27, 1979). Appendix D at 21a.

On November 19, 1980, nearly 15 months later, the court of appeals allowed the petitioner to file a *pro se* Brief and Argument, instanter. On December 3, 1980, the court denied petitioner's motion for appointment of counsel. The Brief and Argument for Appellees was filed on January 5, 1981 and a Reply Brief followed on January 20, 1981.

The appellant's main brief dedicated two pages to arguing that the Illinois statute created a liberty expectation. The brief did not mention *Greenholtz* or any Illinois case law. The appellees responded to the argument in one paragraph relying on *Greenholtz* and *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 259 N.E.2d 33 (1970). The appellant replied in a one page argument citing as authority the Constitution of Illinois (1970), art. I, sec. 11.

Just over one year later, on February 9, 1982, the Seventh Circuit rendered the lengthy opinion at issue in this petition. *United States of America ex rel. Scott v. Illinois Parole and Pardon Bd.*, 669 F.2d 1185 (7th Cir. 1982). See Appendix A. There was no oral argument.

The court of appeals found that the Illinois statute can be "[R]easonably read as not creating an expectancy of release on parole" and "can be read as merely a statement by the Illinois legislature as to when the Board must deny

parole, leaving the Board free in the absence of those conditions to exercise its own discretion in deciding whether or not parole can be granted." 669 F.2d at 1189. The court chose, however, not to accept that reading and concluded that the Illinois parole release statute does not create a constitutional liberty interest. 669 F.2d at 1190.

On February 23, 1982, the appellees filed a Petition for Rehearing and Suggestion for Rehearing *en banc*. The appellant was ordered to respond to the petition on March 2, 1982.

On March 3, 1982, Circuit Judge Sprecher "voted" to deny rehearing and rehearing *en banc*. 669 F.2d at 1192. Also on March 3, 1982, the mandate issued from the Seventh Circuit. The mandate was recalled and stayed on motion of the appellees on March 17, 1982, and remains stayed.

On March 23, 1982, the court, *sua sponte*, appointed Professor Gary Palm of the University of Chicago to represent the appellant for the purpose of responding to the petition for rehearing.

On April 28, 1982, the appellees sought leave to cite additional authority in support of the petition. On April 29, 1982, the appellant responded to the petition.

On May 7, 1982, a formal vote was requested on the question of rehearing *en banc*. On May 10, 1982, the court ordered the appellant to respond to the Motion for Leave to Cite Additional Authority.

Judge Sprecher died on May 15, 1982.

On May 19, 1982, the appellant filed objections to the Motion for Leave to Cite Additional Authority.

On May 20, 1982, the vote on rehearing was completed.

On June 18, 1982, the court issued its Order denying the petition. Circuit Judge Posner (recently Professor Posner of the University of Chicago) did not participate in the consideration of the petition. Judge Sprecher's vote of March 3, was counted as a vote to deny the petition. Circuit Judge Coffey filed a dissent addressed to the decision to count Judge Sprecher's vote. 669 F.2d at 1192, 1193.

On June 24, 1982, a corrected Order denying the petition was entered. See Appendix B.

On June 25, 1982, the appellees filed a Motion to Reconsider or in the alternative for disclosure of the vote count and Judge Posner's reason for recusal. The motion was considered by the full court, except—again—Judge Posner, and was denied on July 7, 1982. See Appendix C.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS INTERPRETED THE ILLINOIS PAROLE STATUTE TO CREATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN PAROLE WHICH HAS BEEN CONSISTENTLY REJECTED BY THE COURTS OF ILLINOIS AND IS CONTRARY TO THE INTENTION OF THE ILLINOIS LEGISLATURE AND THE INTERPRETATION OF THE STATUTE BY THE ILLINOIS PRISONER REVIEW BOARD.

In this case, the United States Court of Appeals for the Seventh Circuit has interpreted an Illinois statute in a manner that has been consistently rejected by the courts of Illinois. As a result, the Illinois Prisoner Review Board has been virtually stripped of the discretion to deny parole vested in it by the legislature of Illinois and consistently respected by the Illinois courts. Moreover, this decision has created, potentially, an annual federal cause of action for more than 2,000 Illinois inmates[1]—a cause of action that had previously been rejected by the court of appeals and the district courts on many occasions before this decision.

The statutory provision involved is a section of the Illinois Unified Code of Corrections which was enacted in 1972 and which limits the Illinois Prisoner Review Board's (prior to 1978 the board was called the Pardon

[1] Even though the Mandate has not yet issued in this case, the Illinois Attorney General has been ordered to respond to 28 Petitions for a Writ of Habeas Corpus which have already been filed in the United States District Courts in Illinois relying on *Scott* for the constitutional basis of their claims. *See* 28 U.S.C. §2254. See Appendix L.

and Parole Board) authority to grant parole to certain types of inmates. The provision in pertinent part, reads:

> (c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) There is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1981, ch. 38, §1003-3-5(c).

The analysis of any parole statute must begin with this Court's decision in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). In *Greenholtz*, this Court rejected the notion that by holding out the possibility of parole a state creates a constitutional liberty interest in release on parole. Such a possibility of parole, "provides no more than a mere hope that the benefit will be obtained." *Greenholtz*, 442 U.S. at 11. In order for a prisoner to have a constitutionally protected interest in parole, the prisoner:

> [C]learly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Greenholtz, 442 U.S. at 7.

This Court did find such a legitimate expectation of parole in the language of the unique Nebraska parole statute that was involved in *Greenholtz*. That statute provided, in relevant part, that:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it ***shall order his release unless*** it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would deprecate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date. Neb. Rev. Stat. §83-1, 114(1) (1976).

Greenholtz, 442 U.S. at 11. (Footnote omitted; emphasis added).

This Court found that this statute created a "legitimate claim of entitlement" to parole to which the procedural guarantees of due process attached.

The Nebraska statute's mandatory language ("shall order his release unless") was crucial to this Court's decision. *E.g., Connecticut Bd. of Pardons v. Dumschat*, ... U.S. ....., 101 S.Ct. 2460, 2465 (1981); *Averhart v. Tutsie*, 618 F.2d 479, 481 (7th Cir. 1980); *See, Davis v. Ball Memorial Hospital Ass'n*, 640 F.2d 30, 39 (7th Cir. 1980) (stating that mandatory parole eligibility was determinative in *Greenholtz*); *Boothe v. Hammock*, 605 F.2d 661, 664 (2nd Cir. 1979) ("The [*Greenholtz*] majority could not have called the Nebraska scheme 'unique' if it believed that it resembled the statutes of the 47 other states that identify, as relevant to parole decision-making, the same factors mentioned in the Nebraska statute. The 'shall/unless' formula was decisive for the Court.").

In every reported decision known to counsel in which a court considered whether a parole system created a constitutional liberty interest under *Greenholtz*, the presence or absence of mandatory language *assuring parole* was held determinative.

In only three cases has a court, properly applying the *Greenholtz* test, found such a liberty interest. The Eighth Circuit Court of Appeals found a liberty interest in the Missouri parole system in *Williams v. Missouri Bd. of Probation and Parole*, 661 F.2d 697 (8th Cir. 1981) and in the federal parole system in *Evans v. Dillahunty*, 662 F.2d 522 (8th Cir. 1981). The Missouri parole statute provided:

> When in its opinion there is reasonable probability that the prisoner can be released without detriment to the community or to himself, the *board shall release* on parole any person confined in any correctional institution administered by state authorities.

Williams, 661 F.2d at 698. (Emphasis added).

The Eighth Circuit concluded that "the Missouri law providing that *when* the statutory guidelines are met the inmate *shall* be released on parole gives rise to the same protectible entitlement as the Nebraska scheme . . . ." *Williams*, 661 F.2d at 699. (Emphasis in original).

In *Evans*, the Eighth Circuit found that the very similar mandatory provisions in the federal parole statute also gave rise to a constitutional liberty interest. *Evans*, 662 F.2d at 526. The federal statute was also considered in *Bowles v. Tennant*, 613 F.2d 776 (9th Cir. 1980). While not actually deciding the issue, and with some reservations, that court suggested that the federal statute's mandatory language might meet the *Greenholtz* test. *Bowles*, 613 F.2d at 778.

On the other hand, on numerous post-*Greenholtz* occasions, federal courts have considered state parole systems and found that they did not create a liberty interest because they lacked the mandatory character peculiar to the Nebraska and federal statutes. As the Tenth Circuit Court of Appeals noted in 1981, prior to the *Williams* decision:

> Nebraska's "shall . . . unless" system appears to be quite unusual. Although the federal system is similar, [citing *Bowles*] no other state system which has been the subject of a circuit court opinion has been found to be enough like Nebraska's to establish a liberty interest.

Candelaria v. Griffin, 641 F.2d 868 (10th Cir. 1981).

The Seventh Circuit considered the Indiana parole system in *Averhart v. Tutsie*, 618 F.2d 479 (7th Cir. 1980). Because "the sufficiency of the claim of entitlement must be decided by reference to state law", *Averhart*, 618 F.2d at 482 (quoting *Bishop v. Wood*, 426 U.S. 341, 344 (1976)), the court accepted the "authoritative interpretation" of the Indiana statute given by the Indiana Supreme Court. That court had held:

> Our parole release statute *creates no expectancy of release* as envisioned in the Nebraska statutory scheme; rather, our Legislature has invested the Parole Board with almost total discretion in such matters.

Averhart, 618 F.2d at 482. On the basis of that state court interpretation, the court held that no constitutional liberty interest was created by the Indiana parole statute. *Averhart*, 618 F.2d at 482.

The remaining circuit court decisions establish that the Nebraska and federal system stand alone because of their unique mandatory natures. *See Stanton v. Wainwright*, 665 F.2d 688 (5th Cir. 1981) (Florida parole system did not give rise to a liberty interest because it did not provide for any specific conditions which would mandate an inmate's release until the commission approve[d] an effective parole release date."); *Williams v. Briscoe*, 641 F.2d 274 (5th Cir. 1981) (Texas parole system did not give rise to a liberty interest because an applicant for parole "must have both the parole board's favorable recommendation and the approval of the Governor,

neither of which is statutorily granted as a matter of right."); *Schuemann v. Colorado State Bd. of Adult Parole*, 624 F2d 172 (1975) (10th Cir. 1980) (Colorado parole system did not create a liberty interest because "the Colorado statute gives the Board broad discretion and does not require the granting of parole upon a showing of any particular facts."); *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979) (Ohio parole system did not create a liberty interest because the standard that "Parole Authority may grant parole if 'in its judgment there is a reasonable ground to believe' that paroling the inmate would further the interests of justice and be consistent with the welfare and security of society" did not "mandate a presumption of parole release."); *Boothe v. Hammock*, 605 F.2d 661 (2nd Cir. 1979) (New York parole system did not create a liberty interest because parole was "committed to the discretion of the Parole Board" and "unlike Nebraska's [did] not establish a scheme whereby parole whall be ordered unless specified conditions are found to exist."); *Slocum v. Georgia State Bd. of Pardons and Paroles*, 678 F.2d 940 (11th Cir. 1982) (Georgia parole system does not create a liberty interest even though many of the statutory provisions structuring the Board's exercise of discretion are mandatory); *Shirley v. Chestnut*, 603 F.2d 805 (10th Cir. 1979) (Oklahoma parole system did not create a liberty interest because there are "no written and formally established factors to be considered" and the only statutory guidance is that the board act "as the public interest requires."); *Accord, Jackson v. Reese*, 608 F.2d 159 (5th Cir. 1979); *See also Block v. Potter*, 631 F.2d 233, 242-43 (Seitz, C.J., dissenting); *United States ex rel. McCalvin v. Irving*, 504 F.Supp. 369 (C.D.Ill. 1980); *Johnston v. Alabama Pardon and Parole Bd.*, 530 F.Supp. 589 (M.D.Ala. 1982); *Houser v. Morris*, 518 F.Supp. 873 (N.D. Ga. 1981); *Robinson v. Mabry*, 476 F.Supp. 1022 (E.D.

Ark. 1979); *Austin v. Armstrong*, 473 F.Supp. 1114 (D. Nev. 1979); *Campbell v. Montana State Bd. of Pardons*, 470 F.Supp. 1301 (D.Mont. 1979).

This is the same analysis applied to questions of liberty interests in other contexts. *E.g., Vitek v. Jones*, 445 U.S. 480, 489-90 (1980) (liberty interest arose from statutory provision that prisoner would not be transferred to mental hospital absent determination that prisoner suffers from a mental disease); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (liberty interest in statutory guarantee of grant of good time credits absent serious misbehavior); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (liberty interest in remaining free on probation); *Morrissey v. Brewer*, 408 U.S. 471, 479-80 (1972) (liberty interest in entitlement to remain free on parole as long as parolee abides by terms of parole). *See Neal v. Secretary of the Navy, Etc.*, 639 F.2d 1029, 1041 n.12 (3d Cir. 1981) (collecting and commenting upon the foregoing decisions).

Furthermore, in *Connecticut Bd. of Pardons v. Dumschat*, ... U.S. ....., 101 S.Ct. 2460 (1981), this Court found no liberty interest in the Connecticut law on commutation of prison sentences. The Court stated, "The Connecticut commutation statute, having no definitions, no criteria, and no mandated 'shalls', creates no analogous duty or constitutional entitlement." *Dumschat*, ... U.S. at ....., 101 S.Ct. at 2465. Finally, in *Meachum v. Fano*, 427 U.S. 215 (1976), this Court found that a prisoner had no liberty interest in remaining at a particular prison where the prison transfer decisions were to be made:

> [F]or a variety of reasons and often involv[ing] no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.

Meachum, 427 U.S. at 225. Indeed, this Court likened transfer decisions to parole decisions generally in *Greenholtz*. *Greenholtz*, 442 U.S. at 10. Furthermore, it mat-

tered not that the transfer decision "visited a 'grievous loss' upon the inmate" absent a constitutional entitlement. *Moody v. Daggett*, 429 U.S. 79, 88 n.9 (1976) (quoting *Meachum*); *Jago v. Van Curen*, ... U.S. ....., 102 S.Ct. 31, 33 (1982). *Cf., Solomon v. Benson*, 563 F.2d 339, 342 (7th Cir. 1977). *See generally Anderson v. Winsett*, ... U.S. ....., 101 S.Ct. 891 (1981) (White, J., dissenting); *Pugiliese v. Nelson*, 617 F.2d 916, 921-25 (2d Cir. 1980); *Griffeth v. Detrick*, 603 F.2d 118, 120-21 (9th Cir. 1979), *cert. denied* 445 U.S. 970 (1980); *Young v. Hunt*, 507 F. Supp. 785 (N.D.Ind. 1981); *Marciano v. Coughlin*, 510 F. Supp. 1034, 1037 (E.D. N.Y. 1981); *Martino v. Gard*, 526 F.Supp. 958, 960 (E.D. N.Y. 1981).

In this case, the Seventh Circuit recognized that:

> [B]y stating its rule in the negative Illinois has left open the possibility that its statute can also be reasonably read as not creating an expectancy of release on parole. *It can be read as merely a statement by the Illinois legislature as to when the Board must deny parole, leaving the Board free in the absence of those conditions to exercise its own discretion in deciding whether or not parole should be granted.* Under this construction, the statute would not create a legitimate expectation of release and due process considerations would not apply. *See Averhart v. Tutsie*, 618 F.2d 479 (7th Cir. 1980) (where legislature has invested Parole Board with almost total discretion in such matters, inmate had no legitimate expectation of release).

669 F.2d at 1185 (emphasis added).

At this point, the Court should have stopped and deferred to an unbroken line of Illinois case law spanning nearly 90 years and held that there is no expectation of parole in Illinois. Instead, the Court went on to not just distinguish *but reject* the Illinois case law in a footnote[2]

[2] "Although the Illinois courts have frequently noted that, as a general matter, parole is a matter of grace and clemency

(Footnote continued on following page)

that can best be described as nothing short of amazing. At the very least, if the Court believed Illinois case law to be "inconclusive it should have required the inmate to present his claim in the state courts through mandamus. *Duckworth v. Serrano*, ... U.S. ....., 102 S.Ct. 18 (1981). *Duckworth* would allow the inmate to avoid exhaustion only if the state case law indicated that it would be futile. On the other hand, a finding that exhaustion would be futile would be authoritative on the question of whether the state has created an expectancy of parole and would have precluded the court of appeals from reaching a decision on the merits of Scott's claim. *See Averhart*, 618 F.2d 479 (7th Cir. 1980).

Nonetheless, with this obstacle out of the way, the court went on to rely on the Council Commentary in Illinois

---

[2] *continued*

rather than of right, *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 337-38, 259 N.E.2d 33 (1970); *People v. Hawkins*, 54 Ill.2d 247, 252, 296 N.E.2d 725 (1973); *People ex rel. Weaver v. Longo*, 57 Ill.2d 67, 309 N.E.2d 581 (1974), they have not interpreted the scope of the interest, if any, this particular provision was intended to afford Illinois state prisoners. The Illinois Appellate Court came closest to doing so in *People ex rel. Tucker v. Kotsos*, 42 Ill.App.3d 812, 818, 1 Ill.Dec. 516, 356 N.E.2d 798 (1976). In comparing a parole release determination with a trial court's decision of whether to grant probation, the court stated: "Similarly, with parole, the Parole and Pardon Board has great discretion in determining who shall be granted parole. However, the Board must not parole a person eligible for parole if it is determined that there is a substantial risk that he will not conform to reasonable conditions of parole, his release at that time would deprecate the seriousness of his offense or promote disrespect for the law." *While this language seems to indicate that the second interpretation of section 1003-3-5(c) under which no liberty interest is created is correct, we do not find it conclusive since it is not clear on the issue and appeared only as dicta in the court's opinion. Compare Averhart v. Tutsie, supra* (Where Indiana Supreme Court had expressly held that state's parole release statute was unlike Nebraska's in that it created no expectancy of release, this court is bound by that interpretation)". 669 F.2d at 1185, fn. 4. (emphasis added).

Smith-Hurd Annotated[3] and The Rules of the Illinois Prisoner Review Board[4] to hold that the Illinois parole scheme created an expectation of parole. The petitioners respectfully suggest that, while busy looking under the leaves, the court of appeals missed the forest.

A review of parole in Illinois demonstrates that there is nothing *mandatory* about the Illinois parole scheme except the limitation on the board's ability to *grant* parole which is significantly different from placing a limitation on the ability to *deny* parole as in the Nebraska statute considered in *Greenholtz*. The first Illinois Parole Act was passed in 1895. *See George v. The People*, 169 Ill. 447 (1897). That act and all subsequent acts have contained provisions related to procedures before the Board. These provisions have always been viewed as creating mandatory duties on the Board. *People v. Kinney*, 30 Ill.2d

---

[3] "The Board should state one or more of the reasons listed in subparagraph (c) as the basis for its decision denying parole as required by subparagraph (f). Additional reasons may also be stated. Ill. Ann. Stat. ch. 38 §1003-3-5, pp. 87-88 (Smith-Hurd). This language indicates that, while other reasons may also be given for the denial, such reasons are to be additional to, and not in place of, the statutory reason or reasons relied upon. The implication is that parole must be granted where none of the specified reasons for denial are found to exist.[5] 669 F.2d at 1185. Footnote 5 reads:

> "[5]. Although the word 'Additional' might also be read as meaning alternative, we are unpersuaded that this is the intended meaning in this context." 669 F.2d at 1185, fn. 5.

[4] The Rules of the Illinois Prisoner Review Board is a document which is periodically revised. The Court did not inform the parties which edition it may have relied on in reaching its conclusions and how this edition may have varied from prior subsequent editions. The "rule" cited first appeared in a 1978 version of the Rules. More importantly, however, the court did not consider the effect as to scope or finality of the rules on the Board. An argument based on the Rules was carefully considered and rejected by Judge Prentice H. Marshall in *Sanders v. Illinois Prisoner Review Bd.*, No. 80 C 963 (N.D. Ill. January 13, 1982) (appeal pending). See Appendix F.

201, 195 N.E.2d 651 (1964). The mere existence of mandatory provisions or even provisions which directly structure the Board's discretion, however, does not give rise to an expectation of parole, where those provisions do not limit the Board's discretion in denying parole. *See Slocum v. Georgia State Bd. of Pardons and Paroles*, 678 F.2d at 941.

Illinois courts have consistently told Illinois inmates that their indeterminate sentence is for the full term fixed by law for the crime. *People ex rel. Castle v. Spivey*, 10 Ill.2d 586, 592, 141 N.E.2d 321 (1957). An Illinois prisoner has no right to demand his discharge before the expiration of the maximum term of his sentence. There is no legal right to parole in Illinois. It is a matter of grace and executive clemency. That was the law in Illinois prior to the enactment of Ill. Rev. Stat. 1973, ch. 38, §1003-3-5(c). *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 338, 259 N.E.2d 33 (1970).

That was, and still is, the law in Illinois after the enactment of §1003-3-5(c). *People v. Hawkins*, 54 Ill.2d 247, 252, 296 N.E.2d 725 (1973); *Harris v. Irvin*, 90 Ill. App. 3d 56, 60, 412 N.E.2d 976 (5th Dist. 1980). ("Appellant concedes, *as he must*, that he has no constitutional right to parole") (emphasis added).

At issue in *Harris*, as in *Scott* was the Board's discretionary denial of parole. 90 Ill. App. 3d at 56. *Harris* is the most recent of the Illinois parole cases which began with *George* and which have interpreted Illinois parole laws and have always told Illinois' prisoners that their parole rests, as a matter of grace, in the discretion of the Board. *See People v. Nowak*, 387 Ill. 11, 55 N.E.2d 63 (1944).

Petitioner believes that 85 years of Illinois case law interpreting Illinois statutes should be sufficient to convince the federal courts that Illinois does not give inmates

any expectation in parole release and that the federal courts should refrain, as do the Illinois courts, from meddling in the Prisoner Review Board's discretionary realm. Nonetheless, should the Court doubt the correctness of the state court's interpretation of what the Illinois legislature was seeking to achieve through §1003-3-5(c), the petitioner respectfully suggests that a review of the floor debate should settle the matter.

Section 1003-3-5(c) was part of Public Act 77-2097. The Act was part of the proposed Unified Code of Corrections. *Ill. Rev. Stat.* 1973, §1001-1-1 *et seq.* On the floor of the Illinois Senate on May 9, 1972, the following insight was provided concerning the intent of the new Code.

SENATOR PARTEE:

> Well, Mr. President and members of the Senate, I simply want to call attention to the members of the Senate, that this is the kind of herculean effort that the Senate is capable of. I think certainly that those men . . . an' others on [sic] the Judiciary Committee itself is entitled to our praise an' our gratitude for having so studiously applied themselves to what was a very difficult subject, some 485 bills in all . . . ah . . . many of which . . . ah . . . seemed to be almost impossible an' they've worked long an' tedious hours an' they have put this package together in a form which I now find to be acceptable to practically everybody, while at the same time not destructive of the concept which is involved here. . . .

Transcript of Proceedings of the Illinois Senate, May 9, 1972, pp. 43-44.

SENATOR GRAHAM:

> I met with Al Scott an' some of the fellows last year in an effort to tone down what I thought was an unbearable situation imposed by the original bills upon the wardens of the penitentiaries. Now, mem-

bers of the Senate, I might be willing to suggest to you that every liberal unit in the country has been interested in these an' some conservatives. . . . Some of the wardens were extremely concerned about these bills an' as Senator Partee said, just recently, the States Attorneys an' the parole system in Illinois were concerned too. We are facing probably an era in correctional institutions whereby with the influence of the American Civil Liberties Union an' other dogooders that we are supposed to adopt the attitude everybody incarcerated in our prisons is there because they skipped Sunday School. Now, I can tell you having gone through an' talk with . . . Bill Arends [sic] an' Speck an' some of those other fellows they didn't skip Sunday school to get where they are now, but despite that, we have moved into a new era in correctional institutions an' the addressment [sic] to the real attempt for the rehabilitation of prisoners. Contained within these bills, which are very complicated, are many provisions that some of you will never read an many of you don't care much about. But if you have fears as to the complications that may arise from the passage of these bills you can be discomforted by the fact that the Judiciary has long been doing our job for us as you know. Like to call your attention to one of their interferences into the penal institutions last year, when a judge in Chicago ordered the release of three prisoners from Sheridan because they were being confined a little too tightly, one of 'em was in for murder, one for double murder, an' one for rape 'an manslaughter, but he demanded we turn 'em loose. Now, I have a firm conviction that if these bills are not enacted an' I think they will be, the courts, say once again is gonna be meddling with the business of the State of Illinois which should be left to the General Assembly.

Id. pp. 45-46.

Had the Illinois legislature wanted to change the scheme of parole in Illinois to limit the Board's authority to deny parole and provide inmates with the expectation of release found in the Nebraska statute, it certainly could have. *But it did not.*

The Illinois legislature carefully chose language which limits *only* the Board's ability to *grant* parole. Clearly, in light of Senator Graham's remarks, there was no legislative intent to invite the federal courts to meddle in the discretion of the Board. Indeed, limiting the Board's ability to grant parole further decreases the reasonableness of an inmate's claim of an expectation of parole. It does not, on the other hand, limit the Board's broad discretion in denying parole. Nor has the Board interpreted the legislation as a limitation on its ability to deny parole. For example, in 1977, inmate William Witherspoon (*See Witherspoon v. Illinois*, 319 U.S. 510 (1968)) was denied parole because he was "an habitual offender" a classification clearly not explicitly covered by §1003-3-5(c). See Appendix M. It is fundamental that an administrative body's interpretation of a relevant statute is entitled to great deference. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). Here, the court of appeals not only did not defer to the administrative agency's interpretation, it failed to even inquire as to the Prisoner Review Board's interpretation of §1003-3-5(c).

The Seventh Circuit's analysis in *Scott*, seeking to determine legislative intent without consideration of the state court decisions, the mood of the legislature at the time it enacted §1003-3-5(c) or the interpretation of the agency involved, was contrary to what a due process analysis involving a state parole law and statutory construction questions should have followed. Rather, the court should have first looked to the extent of discretion that the legislature and state courts allow to determine whether a reasonable expectation of parole exists. The

answer to that question determines whether due process attaches. *Greenholtz, supra.*

In Illinois, the answer to that question is that state courts have allowed unbridled discretion. From that basis, the court of appeals should have concluded that no reasonable expectation of parole, and thus no protected liberty interest, is involved in the Illinois parole scheme.

This Honorable Court should therefore grant the Petition for a Writ of Certiorari and uphold the state courts' analysis of the Illinois parole scheme.

II.

THE HOLDING OF THIS CASE IS IRRECONCILABLE WITH THE SEVENTH CIRCUIT'S RECENT HOLDING IN *WELSH v. MIZELL*, AS *WELSH* RENDERED THE STANDARD ANALYZED BY THE COURT IN REACHING THE INSTANT DECISION INAPPLICABLE TO THIS PETITIONER.

In this case, the Seventh Circuit found that the Illinois Parole release statute provides parole-eligible inmates with a constitutionally protected liberty interest. 669 F.2d at 1190. In reaching this conclusion, the court relied on its interpretation of the provisions of *Ill. Rev. Stat.* 1979, ch. 38, sec. 1003-3-5(c); the Council Commentary to that section (*Ill. Ann. Stat.* ch. 38, sec. 1003-3-5, pp. 87-88 (Smith-Hurd)); and Rule V[5] of the Rules of the Illinois Prisoner Review Board. 669 F.2d at 1188, 1189.

The Court then remanded the matter for a determination as to whether the Board uniformly applies Rule V and Section 1003-3-5(c)(2) to all persons convicted of murder. 669 F.2d at 1911.

---

[5] The Court did so, apparently without considering the implication of Rule IV, which provides the factors available for consideration in a parole decision, or the finality or scope of the rules over board determinations.

In *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982) (Petition for a Writ of Certiorari pending, No. 81-2105), the same court had held that the Prisoner Review Board must apply the statutes and regulations in effect at the time of a petitioner's conviction in making a parole decision. 668 F.2d at 332.

William Scott was convicted in 1968. Petition at 1; 668 F.2d at 1187, fn. 1. The current language of *Ill. Rev. Stat.*, ch. 38, sec. 1003-3-5 was enacted in 1973. The Council Commentary, cited at 669 F.2d 1189, was also added in 1973. Rule V of the Rules of the Illinois Prisoner Review Board first appeared in the form cited on page 1189-90, n. 6, in the 1978 version of those rules.

The *Welsh* decision mandates that this petitioner's claim be analyzed under the criteria in effect at the time of his conviction. Yet, the entire analysis and order on remand in this case is based not on the criteria in effect in 1968, but rather, on criteria established since 1973. By deciding this case on the basis of language that, according to *Welsh*, can never be applied to this petitioner, the court has adopted a position which is irreconcilable to that taken in *Welsh*.

In analyzing the petitioner's claim under statutes and regulations enacted since his conviction, and in ordering the district court to reconsider his claim under those same criteria, the court has either disregarded the mandate of *Welsh* or this Court's longstanding prohibition on interpreting statutes to determine constitutional issues when no constitutional analysis is required to resolve the case. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348, 56 S.Ct. 46C (1936) (Brandeis, concurring).

This Court should grant the Petition for a Writ of Certiorari to resolve the confusion resulting from the court of

appeals zeal to scrap and then reconstruct the Illinois Parole scheme.[6]

III.

THE PROCEDURAL HISTORY OF THIS CASE REQUIRES, AT THE VERY LEAST, A REMAND TO THE COURT OF APPEALS WITH DIRECTIONS THAT THE COURT ALLOW BOTH PETITIONER AND RESPONDENT THE OPPORTUNITY TO FULLY BRIEF AND ARGUE THE IMPORTANT ISSUES CONTAINED IN THIS CASE.

The procedural history of this case is marred by the court of appeals' assumption of an advocate's role and by the appearance of a manipulation of federal and local rules of procedure (for example, allowing an anticipatory vote by a deceased former member of the court of appeals to defeat a petition for rehearing *en banc*), thus preventing the People of the State of Illinois from ever properly presenting their position on the important issues contained in this case.

The procedural history of this case begins with Circuit Rule 35 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit which provides for the disposition of certain classes of cases through unpublished orders.[7]

---

[6] These facts were called to the attention of the court of appeals in the Petition for Rehearing filed on February 23, 1982. As noted in the Statement of Facts, said Petition was denied on June 18, 1982.

[7] Circuit Rule 35. The following rule is the Plan for Publication of Opinions of the Seventh Circuit Promulgated pursuant to Resolution of the Judicial Conference of the United States:

(a) Policy. It is the policy of the circuit to reduce the proliferation of published opinions.

(b) Publication. The court may dispose of an appeal by an order or by an opinion, which may be signed or per

(Footnote continued on following page)

Shortly after this Court's opinion in *Greenholtz*, the United States District Courts in Illinois began uniformly

---

[7] *continued*

curiam. Orders shall not be published and opinions shall be published.

* * *

(2) Unpublished order:

* * *

(ii) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and the news media, and shall be available to the public on the same basis as any other pleading in the case;

* * *

(iv) Except to support a claim of *res judicata*, collateral estoppel or law of the case, shall

* * *

not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument; or (b) by any such court for any purpose.

(c) *Guidelines for Method of Disposition.*

(1) Published opinions.

A published opinion will be filed when the decision:

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

* * *

(2) Unpublished orders.

When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order.

denying review of Illinois prisoners' claims concerning the alleged denial of due process rights in parole denial proceedings after finding no expectation of parole had been created by Illinois law. *See e.g., Walker v. Irving*, No. 79 C 623 (N.D. Ill. October 18, 1979); *Parisie v. Irving*, No. 80 C 131 (N.D. Ill. January 22, 1980); *Burns v. Irving*, No. 80 C 337 (N.D. Ill. January 24, 1980); *Sanders v. Illinois Prisoner Review Board*, No. 80 C 963 (N.D. Ill. January 13, 1981). See Appendices F, G, H.

Indeed, as recently as December, 1981, the court of appeals used a Rule 35 order to approve this position. That brief order read:

> Plaintiff filed his civil rights suit based on 42 U.S.C. Section 1983 alleging that defendant had violated his constitutional rights by arbitrarily denying him parole. The trial court denied him leave to proceed in forma pauperis on his complaint. The district court relied on *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 42 U.S. [sic], (1979) in holding that the Illinois statutory provisions governing parole release for prisoners serving indeterminate sentences do not create an entitlement interest so that plaintiff need be accorded due process protections in parole release proceedings. The trial court denied plaintiff leave to proceed in forma pauperis on the ground that the complaint was frivolous.
>
> On May 21, 1980 we granted plaintiff leave to proceed on his appeal from this dismissal order. On the basis of complete review of the briefs and record we conclude that the order of the district court was sound. Thus, the dismissal order is hereby affirmed.

Burns v. Irving, No. 80-1429 (December 8, 1981). See Appendix I.

Furthermore, in *United States of America ex rel. Parisie v. Irving*, No. 80-1240 (July 8, 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 168 (1980), the court of appeals used an unpublished order to deny the petitioner leave to

raise a claim identical to the one here *in forma pauperis*. The case was dismissed after the petitioner failed to pay any docketing fee. The petitioner then brought a petition for a writ of certiorari alleging that by denying him leave to appeal *in forma pauperis* the Seventh Circuit denied him access to the courts. Certiorari was denied by this Court.

The Seventh Circuit did take an opposite approach in *Newbury v. Irving*, No. 80-2352 (July 23, 1981) (See Appendix J), where it remanded a case for further consideration after the district court had denied leave to proceed with a 42 U.S.C. §1983 action *in forma pauperis*. That order merely stated that counsel on appeal had demonstrated that a rational argument could be made for finding a protected liberty interest and that the district court should have listened to that argument. However, the *Burns* decision, coming several months after the *Newbury* order, indicates that the court had, apparently, not been impressed for long with the *Newbury* arguments.

The only other authority from the Seventh Circuit for existence of a due process interest prior to the decision in this case was the pre-*Greenholtz* decision in *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976). *Richerson* was, however, as the Seventh Circuit noted in this case, based upon a rationale which "*Greenholtz* specifically rejected,"; i.e., that by holding out the possibility of parole the state created a liberty interest in parole. *United States ex rel. Scott v. Illinois Parole and Pardon Bd.*, 669 F.2d 1185 at 1187. The *Richerson* decision is therefore no authority for the question of whether a liberty interest is created by the parole system now under consideration.

It was in this setting that William Scott filed his *pro se* brief on November 19, 1980, alleging, *inter alia*, that he was being denied parole in violation of the due process

clause of the Fourteenth Amendment to the United States Constitution. The most recent of the four cases cited in his brief in support of the proposition was *Wolff v. McDonnell*, 418 U.S. 554 (1974). No mention was ever made of *Greenholtz*, despite the fact that the district court had analyzed the Illinois parole law in light of *Greenholtz* and had found no protected liberty interest. *United States of America ex rel. Scott v. Illinois Parole and Pardon Board*, No. 79 C 860 (August 27, 1979). See Appendix D. On December 3, 1980, the Seventh Circuit denied the petitioner's motion for appointment of counsel.

On January 5, 1981, the respondents filed their brief which only summarily highlighted what the federal courts in Illinois had consistently, *to that point*, indicated what the law was. The petitioner responded to this argument in his Reply Brief by asserting that the Parole Board was violating the Constitution of the State of Illinois (1970), art. I, sec. 11. Because the Seventh Circuit had deemed the case to be of insufficient merit to appoint counsel, there was no oral argument.

More than a year after the filing of the Reply Brief the Seventh Circuit rendered its decision in the form of a fourteen page opinion that could have only have resulted from the assumption of an advocate's role by the court. The opinion addresses theories and cases that were neither raised nor considered by the parties. The opinion anticipated arguments that the State might have raised had there been some reason to believe the law was unsettled and then systematically rejected each. Unfortunately, the opinion chose to ignore the most compelling reasons for finding that no protected liberty interest exists.

As improper as the court's action was, it was not beyond being rectified by merely returning the advocate's

role to the parties for the purpose of a rehearing. The court, however, chose not to allow the petitioners to state their case. The manner in which this was accomplished is just as troubling as the procedural history of the opinion.

On March 23, 1982, the Court appointed Mr. Gary Palm, a Professor of Law at the University of Chicago Law School to represent the respondent for the purpose of responding to the Petition for Rehearing and Suggestion for Rehearing *en banc*. Judge Richard Posner, a new appointee to the Seventh Circuit and former Professor of Law at the University of Chicago Law School, subsequently chose not to participate in the consideration of the Petition for Rehearing. Judge Posner's failure to participate was tantamount to a vote against rehearing since the vote required for rehearing *en banc* is not a majority of the members voting but a majority of the active members of the court. Rule 35(a), Federal Rules of Appellate Procedure.

After the denial of the petition for rehearing, the petitioners filed a motion to reconsider. In that motion, petitioners pointed out that if Judge Posner did not participate because of his former association with counsel for the respondent then the court, as a whole, had improperly cast the first "No" vote on the Petition for Rehearing when Mr. Palm was appointed for the purpose of responding to the petition. The court denied the motion to reconsider without explanation and without submitting the motion to Judge Posner.

More incredibly, the dissent from the order denying the Petition for Rehearing indicates that the Court relied on an anticipatory vote by a deceased member of the court to block a rehearing *en banc*. 669 F.2d at 1192. This, of course, is improper since only the votes of *active* members of the court may be considered on a petition for rehearing. Rule 35(a), Federal Rules of Appellate Pro-

cedure. When the vote on the petition for rehearing was completed on May 20, 1982, former Judge Sprecher was not an active member of the court (having died, after an extended period of hospitalization, on May 15, 1982) and it was improper for the court of appeals to consider his anticipatory vote which had been "recorded" some nine weeks before any vote was formally requested and before the petition was fully briefed including the submission of substantial supplemental authority submitted by the petitioners.

Frankly, the petitioners have no idea why the court of appeals would go to such unusual lengths to deny the opportunity to even address the arguments that seem to have been developed at leisure by the panel which decided this case. This is particularly abhorrent in view of the substantial impact of this case on the Illinois scheme of parole and the caseload of the federal courts in Illinois.

These procedural wrongs can only be corrected by providing the parties the opportunity to fully address the significant issues raised by the Seventh Circuit after the filing of the parties' initial briefs. These issues were issues that the petitioners had no reason to suspect would arise in view of the known decisions, albeit, decisions under Circuit Rule 35, which the court of appeals had consistently rendered since *Greenholtz* was decided. While Circuit Rule 35 states that unpublished orders have no precedential value, repeated orders telling a particular party what the law of the Circuit is on a particular question, have the effect of precedent on the manner in which that party can reasonably be expected to conduct itself in the future. The response to the respondent's brief in the court of appeals was adequate and reasonable *under the circumstances*. The petitioners had no way of predicting that the court of appeals would, *sua sponte*, assume an advocate's role and decide the case in a manner totally inconsistent with prior decisions of that court.

In view of the foregoing procedural history, it is submitted that, at the very least, the judgment in this case should be vacated and the case remanded to the court of appeals with directions to allow appointed counsel, as well as the petitioners, the opportunity to fully brief and argue the important issues contained in this case.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner

MARCIA FRIEDEL
TERENCE M. MADSEN
Assistant Attorneys General
Of Counsel

September 16, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 79-2131

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

v.

ILLINOIS PAROLE AND PARDON BOARD and LOU BREWER,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-860—Bernard M. Decker, *Judge.*

SUBMITTED* OCTOBER 28, 1981—DECIDED FEBRUARY 9, 1982

Before CUMMINGS, *Chief Judge*, SPRECHER and CUDAHY, *Circuit Judges.*

PER CURIAM. This is an appeal from the denial of a petition for a writ of habeas corpus. For the reasons which follow, we reverse the decision of the district court and remand for further proceedings.

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P. (effective Aug. 1, 1979); Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

I

Petitioner William Scott is an inmate at the Stateville Correctional Center in Joliet, Illinois, serving a 25 to 40 year sentence for murder. On March 6, 1979, Scott was granted leave to file his *pro se* petition for habeas corpus. The petition alleged that the Illinois Parole and Pardon Board, now the Prisoner Review Board, had violated Scott's constitutional rights by denying his request for parole for the stated reason that release would deprecate the seriousness of the offense for which he was imprisoned. It also alleged that Scott's rights had been violated in that, unlike other Illinois state prisoners, he was not entitled to a mandatory release date under Ill. Rev. Stat. ch. 38, § 1003-2.1(1979). Scott alleged that he had served the minimum amount of time required under the sentence imposed on him,[1] but had twice been denied parole based on the seriousness of the offense. He claimed he was entitled to immediate release and requested the court to order such relief.

The respondents to the petition were the Warden of Stateville Correctional Center and the Illinois Prisoner Review Board. In reply to the district court's order that they answer the petition, respondents filed a motion for summary judgment with a supporting memorandum of law in which they argued, *inter alia*, that petitioner did not have a constitutional right to parole, that the reason given by the board for the denial was constitutionally sufficient, and that the fact that other inmates with similar records were paroled was not a denial of petitioner's constitutional rights.

The district court granted respondent's motion and dismissed the petition. It held that the Illinois statute governing parole release determinations did not create an expectancy of release on parole and that therefore, under *Greenholtz v. Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), due process did not apply. The Court further held that, even if due process did

[1] At the time his petition was filed Scott had been in prison for approximately eleven years.

apply, the reason provided by the Board for its decision to deny Scott parole was constitutionally sufficient. Finally, the Court held that the different treatment accorded Illinois prisoners sentenced under the new sentencing law did not violate Scott's Fourteenth Amendment right to equal protection of the law.

II

In *United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 919 (1976), this court held that when a state holds out the possibility of parole and makes it an integral part of its penological system, "due process includes as a minimum requirement that reasons be given for the denial of parole release." *Id.* at 800. In this case, we are required to reconsider this conclusion in light of the Supreme Court's more recent decision in *Greenholtz v. Nebraska Penal and Correctional Center*, *supra*.

Greenholtz explicitly rejected the underlying rationale for our holding in *Richardson* that due process requirements apply to Illinois parole release procedures. It held that the mere fact that a state holds out the possibility of parole is not sufficient to invoke the protection of the Due Process Clause of the Fourteenth Amendment.

> That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. *Board of Regents v. Roth*, *supra*, 408 U.S. at 577, 92 S.Ct. at 2709. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process. *Meachum v. Fano*, *supra*, 427 U.S. at 225; 96 S.Ct. at 2538 (1977); *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1977).

425 U.S. at 11.

The *Greenholtz* Court also held, however, that even though the mere existence of a parole system does not give rise to a liberty interest entitled to constitutional protection, the specific statute governing parole release

determinations may have such an effect if it is phrased in such a way as to provide the inmates with a legitimate expectation of release on parole. The Court specifically found that the Nebraska statute there under consideration did create such an interest. In so holding, however, it emphasized that its conclusion was based on the unique structure and language of the Nebraska statute and cautioned that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12.

Since *Greenholtz*, other circuits that have considered the issue have generally found the language and structure of other state parole release statutes sufficiently unlike Nebraska's so as not to confer on state prisoners a constitutionally protected expectation of parole. *See Canderleria v. Griffin*, 641 F.2d 868 (10th Cir. 1981), and cases cited therein. *But see Williams v. Missouri Board of Probation and Parole*, 661 F.2d 697 (8th Cir. 1981). However, in none of these cases was the language of the statute considered by the court the same or even similar to that contained in the statute now before us. For this reason, these cases are of little relevance to the precise issue raised here. Resolution of that issue, as the Supreme Court indicated in *Greenholtz*, requires careful analysis of the specific statute under which parole release determinations are made. Naturally, the Nebraska parole release statute under consideration in that case provides a convenient starting point for that analysis.[2]

---

[2] Neb. Rev. Stat. § 83-1, 114(1) at that time provided:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would deprecate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

The Nebraska statute at issue in *Greenholtz* provided that the Nebraska Parole Board "shall" order the release of a prisoner eligible for parole "unless it is of the opinion that his release should be deferred" because of the existence of any of four specified criteria. In holding that this statute created an expectancy of release entitled to some measure of constitutional protection, the *Greenholtz* majority accepted the inmate's argument that "the structure of the provision together with its use of the word 'shall' binds the Board of Parole to release an inmate unless any one of the four specifically designated reasons are found." 442 U.S. at 11-12. The inmates had argued that the language of the statute created a presumption that parole release would be granted, which in turn created a legitimate expectation of release, absent the finding that one of the prescribed justifications for deferral existed. A majority of the Court agreed.

The Illinois parole release statute at issue in this case is practically a mirror image of the Nebraska statute. Section 1003-3-5(c) of the Illinois Unified Code of Corrections, Ill. Rev. Stat. ch. 38, § 1003-3-5(c) (1979) provides:

> (c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
> (3) his release would have a substantial adverse effect on institutional discipline.

Instead of directing the Board to release an eligible inmate unless one of the conditions is found, Illinois has simply stated the rule in the negative—the Board shall not release the inmate if one of the conditions is found. Even the specified conditions under which release is to be deferred are the same, except for the fact that the Nebraska statute includes an additional reason for deferral which Illinois' does not. Thus, like Nebraska's

parole release statute, section 1003-3-5(c) can be read as creating a legitimate expectation of release on parole.[3]

However, by stating its rule in the negative Illinois has left open the possibility that its statute can also be reasonably read as not creating an expectancy of release on parole. It can be read as merely a statement by the Illinois legislature as to when the Board must deny parole, leaving the Board free in the absence of those conditions to exercise its own discretion in deciding whether or not parole should be granted. Under this construction, the statute would not create a legitimate expectation of release and due process considerations would not apply. *See Averhart v. Tutsie*, 618 F.2d 479 (7th Cir. 1980) (where legislature has invested Parole Board with almost total discretion in such matters, inmate had no legitimate expectation of release).

Although there is no authoritative state court decision indicating which of these two possible constructions is correct,[4] both the Council Commentary to section 1003-3-

---

[3] In *United States ex rel. McCalvin v. Irving*, 504 F. Supp. 368 (C.D. Ill. 1980), the United States District Court for the Central District of Illinois applied *Greenholtz* to section 1003-3-5(c) and concluded that because it lacked the precise "shall/unless" language and structure of Nebraska's statute, it did not give rise to a constitutionally protected liberty interest. We think this is a too narrow reading of *Greenholtz*.

[4] Although the Illinois courts have frequently noted that, as a general matter, parole is a matter of grace and clemency rather than of right, *People ex rel. Jones v. Brantley*, 45 Ill.2d 335, 337-38, 259 N.E.2d 33 (1970); *People v. Hawkins*, 54 Ill. 2d 247, 252, 296 N.E.2d 725 (1973); *People ex rel. Weaver v. Longo*, 57 Ill.2d 67, 309 N.E.2d 581 (1974), they have not interpreted the scope of the interest, if any, this particular provision was intended to afford Illinois state prisoners. The Illinois Appellate Court came closest to doing so in *People ex rel. Tucker v. Kotsos*, 42 Ill. App. 3d 812, 818, 356 N.E.2d 903 (1977). In comparing a parole release determination with a trial court's decision of whether to grant probation, the court stated:

> Similarly, with parole, the Parole and Pardon Board has great discretion in determining who shall be granted

(Footnote continued on following page)

5(c) and the Board's own Rules Governing Parole persuade us that the Illinois parole release statute, like Nebraska's, requires the Board to release an inmate who is eligible for parole unless one of the specified reasons for denial are found to exist. The Council Commentary reads in part:

> Subparagraph (c) expands the vague charge to the Board to determine "whether [the offender] is capable again of becoming a law-abiding citizen." Section 203 (repealed). The Board should state one or more of the reasons listed in subparagraph (c) as the basis for its decision denying parole as required by subparagraph (f). Additional reasons may also be stated.

Ill. Ann. Stat. ch. 38 § 1003-3-5, pp. 87-88 (Smith-Hurd). This language indicates that, while other reasons may also be given for the denial, such reasons are to be additional to, and not in place of, the statutory reason or reasons relied upon. The implication is that parole must be granted where none of the specified reasons for denial are found to exist.[5]

---

[4] *continued*

> parole. However, the Board must not parole a person eligible for parole if it is determined that there is a substantial risk that he will not conform to reasonable conditions of parole, his release at that time would deprecate the seriousness of his offense or promote disrespect for the law.

While this language seems to indicate that the second interpretation of section 1003-3-5(c) under which no liberty interest is created is correct, we do not find it conclusive since it is not clear on the issue and appeared only as dicta in the court's opinion. *Compare Averhart v. Tutsie*, *supra*, (Where Indiana Supreme Court had expressly held that that state's parole release statute was unlike Nebraska's in that it created no expectancy of release, this court is bound by that interpretation).

[5] Although the word "Additional" might also be read as meaning alternative, we are unpersuaded that this is the intended meaning in this context.

The Rules of the Illinois Prisoner Review Board, promulgated pursuant to Ill. Rev. Stat. ch. 38, § 1003-3-2(d), provide further support for this reading of the statute. Rule V entitled *Basis for Denying Parole* lists only the three statutorily prescribed reasons for denial with a set of factors under each for the Board to consider in determining whether it is met.[6] No other basis

---

[6] Rule V reads:

V. BASIS FOR DENYING PAROLE

In accordance with statute, the Board shall not parole a candidate if it determines that:

A. There is substantial risk that the candidate will not conform to reasonable conditions of parole based on one or more of the following factors:
   1. Existence of prior adult felony convictions (mitigating as well as aggravating factors to be considered).
   2. An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
   3. Prior adult parole or probation violations within five years prior to the present offense.
   4. Refusal to be supervised on parole.
   5. No means of financial support or no place of residence. (Continuance not to exceed six months to seek resolution of problem.)
   6. A psychiatric examination determines the candidate is not likely to conform.

B. Release of the candidate would deprecate the seriousness of the offense or promote disrespect for the law, based on one or more of the following factors:
   1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy.
   2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

(Footnote continued on following page)

for a decision denying parole is listed. Rule VII entitled *Denial of Parole* states specifically that an order denying parole "shall contain the reason or reasons for denial based on No. V above and a concise statement of facts supporting the reason or reasons given."

In light of these rules, it appears that the Board itself has interpreted § 1003-3-5(c) as requiring a finding that one of the statutory criteria exist before it can deny an eligible inmate his parole. Read in this way, Illinois' parole release statute is no different than the Nebraska statute considered by the Supreme Court in *Greenholtz*. Like Nebraska's it creates a presumption that an eligible inmate will be paroled unless one of the specified grounds for denial is found to exist and, in doing so, provides him with a legitimate expectation of parole entitled to some measure of constitutional protection.

III

Having concluded that Illinois' parole release statute does create a constitutional liberty interest, it must now be determined whether the reason for denial given by the Board in this case is constitutionally sufficient.

In its notice to Scott informing him of the decision to deny his request for parole, the Board stated:

> The above action is taken based on the Board's feeling that release at this time would deprecate the severity of the crime for which you were convicted namely, Murder, receiving a 25-40 year sentence. Accordingly, your minimum sentence of 25 years,

---

[6] *continued*

C. Release would have a substantially adverse effect on institutional discipline based on one or more of the following factors as established by the finding of an Administrative Review Board.

1. Physical attack on another inmate or institutional staff.
2. Possession of weapons or drugs.
3. Repeated violation of major institutional rules.
4. Violation of any act prohibited by law.

> does not make you eligible to be provided with a release date under the new law.

(R. 11, Exhibit A.) Scott claims that the Board's use of this "boiler plate" reason for denying his parole is constitutionally inadequate.

In *United States ex rel. Richerson v. Wolff, supra*, 525 F.2d at 804, this court adopted the test enunciated by the Second Circuit in *United States ex rel. Johnson v. Chairman of New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974), for determining whether a statement of reasons for a denial of parole is sufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment. In *Johnson*, 500 F.2d at 934, the Second Circuit had said:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the Board's inferences are based.

We believe this is still the applicable test for determining whether a statement of reasons for a decision denying parole is constitutionally adequate. *Greenholtz* makes clear that, even when the Due Process Clause applies to a parole release determination, there is "nothing in the due process concepts as they have thus far evolved that requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release."[7] 442

[7] In rejecting this requirement, Chief Justice Burger wrote for the majority in *Greenholtz*, "[t]o require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate

(Footnote continued on following page)

U.S. at 15. However, we do not read the *Johnson* test to require any such summary of the evidence relied upon. As we read *Johnson*, it requires only that the inmate be told why his request for parole has been denied. This can be accomplished simply by informing him of what in his record was felt by the Board to warrant his denial and why.

Turning to the particular facts of this case, we find we are unable to determine on the record before us whether the statement of reasons given by the Board meets this test. In two previous decisions, this court has upheld parole denials based on the seriousness of the offense for which the inmate was imprisoned. *Richerson, supra*; *Garcia v. United States Board of Parole*, 557 F.2d 100 (7th Cir. 1977). However, in both *Richerson* and *Garcia*, we were careful to point out that in its statement of reasons for the denial the parole board had indicated that it had considered the inmate's specific conduct, and not just the statutory offense for which he had been found criminally liable.[8] It is the failure of the Board to do the same here that causes us difficulty.

We do not dispute the fact that the Board could, at least insofar as the Constitution requires, adopt a prac-

---

[7] *continued*
the Board's parole release determination with a guilt determination." 442 U.S. at 15-16. However, the Court implicitly approved the requirement that the parole authority provide the inmate with a statement of reasons when it denies parole, stating "[t]he Board communicates the reason for its denial as a guide to the inmate for his future behavior. *See Franklin v. Shields*, 569 F.2d at 800 (en banc)." *Id.* We think any reason for denial necessarily assumes some fact or facts about the inmate's case. It is this fact or facts that the Board should include in its statement of reasons.

[8] In *Richerson*, the Board's statement of denial, in addition to listing the inmate's statutory offenses, specifically referred to the fact that police officers had been wounded while doing their duty. 525 F.2d at 803. In *Garcia*, the Board noted that the inmate's conduct "involved the detonation of explosives during the bombing of several business establishments." 557 F.2d at 106.

tice of automatically denying parole to inmates convicted of certain offenses without regard to their specific conduct. Certain offenses, like murder, for instance, are by definition so serious that the Board could reasonably conclude that early release on parole would be inappropriate, regardless whether there were additional aggravating circumstances accompanying it. The Board is expressly empowered to make such a determination and it is not for this court to set it aside.

The difficulty in this case, however, is that we do not know if in fact the Board has adopted such a practice. Although the fact that the inmate was convicted of murder is listed in the Board's Rule V as one of the factors which it considers in determining whether release would deprecate the seriousness of the offense, we do not know from the record before us whether the Board automatically denies parole to all inmates whose commitment offense is murder. If it does not, then the reason for denial given by the Board in this case fails to satisfy the *Johnson* test. For unless the Board denies parole to all inmates whose commitment offense is murder, then its statement that it is denying parole for that reason in this case is tantamount to no reason at all. Clearly, if the Board does grant parole to some inmates whose commitment offense is murder, then its refusal to do so here, unless it is completely arbitrary, must be for some reason other than the fact that Scott was convicted of murder. If that is the case, we think that due process requires at a minimum that that reason be given.

We therefore find it necessary to remand this case to the district court to allow it to determine what in fact the Board's practice is. If that court finds that the Board does grant parole to persons whose commitment offense is murder, it should order the Board to reconsider Scott's request for parole and either grant that request or provide him with a sufficient statement of reasons for its denial.

IV

Lastly, Scott appears to argue that his constitutional rights have been violated by virtue of the fact that he is not eligible for release under Ill. Rev. Stat. ch. 38, § 1003-3-3(c). This section is part of the new sentencing law in Illinois under which the parole system has been eliminated and prisoners are assigned mandatory release dates. By its terms, the new law applies only to persons sentenced after February 1, 1978. Although some prisoners sentenced prior to that time may elect to have a mandatory release date assigned under the new law, that option is not available to prisoners with indeterminate sentences whose minimum term is twenty years or more. Ill. Rev. Stat. ch. 38, § 1003-3-2.1.

The fact that Scott is not entitled to a mandatory release date under the new act raises no claim cognizable under federal habeas corpus. States are certainly free to amend their sentencing laws and, having done so, they are not required to apply them retroactively to persons who have been validly sentenced under the law as it previously existed. In fact, where application of the new law would result in a more severe punishment, they are expressly prevented from doing so by the constitutional prohibition against *ex post facto* laws. *Welsh v. Mizell*, No. 80-1862 (7th Cir. January 12, 1982); *Rodriguez v. United States Parole Commission*, 594 F.2d 170, 173 (7th Cir. 1979). While it is unclear whether application of the new sentencing procedure here would result in a longer or shorter term of imprisonment, in either case Scott has no right to have the new law applied. Having been properly sentenced under the law as it existed at the time of his conviction, he is not entitled to modification at this time.

V

In conclusion, we hold that the Illinois parole release statute provides inmates still under the State's parole system with a constitutionally protected liberty interest. This being so, due process requires at a minimum that an inmate whose request for parole is denied be pro

vided with a statement of reasons for the denial. Because we cannot determine from the record before us whether the statement of reasons given by the Board in this case is constitutionally sufficient, we remand the case for further proceedings. Finally, Scott's objection to the fact that he is not entitled to a mandatory release date under Illinois' new sentencing law fails to state a claim for which federal habeas relief is available.

Accordingly, the district court's judgment is affirmed in part, and reversed and remanded in part.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

CORRECTED JUNE 24, 1982
June 18, 1982

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge*

UNITED STATES OF AMERICA, ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

No. 79-2131 vs.

ILLINOIS PAROLE AND PARDON BOARD and LOU BREWER,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79-C-860—Bernard M. Decker, *Judge.*

---

* Circuit Judge Richard A. Posner did not participate in the consideration or decision of this petition.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled matter by counsel for Respondents-Appellees, a vote of the active members of the court are requested, and less than a majority of the members of the court who voted have voted to grant a rehearing *en banc*.[1] All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.[2]

---

[1] Circuit Judge John L. Coffey requests that he be shown as one of the judges who voted to rehear the case *en banc*. Judge Coffey's statement dissenting from this order is attached hereto.

[2] Circuit Judge Sprecher, a member of the original panel voted to deny rehearing and to deny rehearing *en banc*. Judge Sprecher died on May 15, 1982.

Chief Judge Cummings and Judges Pell, Bauer, Wood, Cudahy, Eschbach and Coffey voted on the question whether Judge Sprecher's vote should be counted in the resolution of the petition. A majority of these judges voted to count Judge Sprecher's vote and it was so counted, together with the votes of the other judges listed at the head of this order.

COFFEY, *Circuit Judge*, dissenting:

I dissent from the order denying the petition for rehearing because, procedural questions aside, I do not believe that it is reasonable or proper for the vote of a former (deceased) member of the court to be used to prevent a majority of the remaining active members from rehearing this case which raises significant legal questions of potentially widespread impact. This is especially true here where Judge Sprecher's initial vote was issued in anticipation of a request that the remainder of the active members vote on the suggestion for rehearing "en banc." Judge Sprecher, a member of the original panel, voted to deny rehearing and rehearing en banc on March 3, 1982. A vote was not requested until May 7, 1982. Thus, obviously Judge Sprecher cast his vote nine weeks prior to the date on which the vote of the other court members was requested. Judge Sprecher died just eight days after this request. The final vote on the rehearing was not completed until May 20, 1982. I analogize the acceptance of Judge Sprecher's vote to a trial court's granting a motion to dismiss before argument was scheduled, heard or even requested.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 7, 1982

BEFORE

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

No. 79-2131

UNITED STATES OF AMERICA, ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

vs.

ILLINOIS PAROLE AND PARDON BOARD and LOU BREWER,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-860—Bernard M. Decker, *Judge.*

This matter comes before the Court for its consideration upon the following document:

1. The "MOTION TO RECONSIDER" filed herein on June 25, 1982, by counsel for the respondents-appellees.

Respondents, Illinois Parole and Pardon Board, et al., have requested that this court reconsider its order of June 18, 1982, in which the court denied Respondents' Petition for Rehearing with Suggestion for Rehearing *en banc*. As an alternative request the Respondents ask the court to "disclose the numerical vote on the Petition for Rehearing and, if that vote was 4-4, Judge Posner's reason for not participating. . . ."

A majority of the active members* of the court have voted to *deny* Respondents' Motion to Reconsider. Respondents' alternative request is also DENIED.

---

* Circuit Judge Richard A. Posner did not participate in the consideration or decision of this motion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner,

No. 79 C 860 -vs-

ILLINOIS PAROLE AND PARDON BOARD, et al.,
Respondents.

MEMORANDUM OPINION AND ORDER

Petitioner has applied for a writ of habeas corpus claiming that respondents have improperly denied him parole in violation of his rights under the due process and equal protection clauses of the Fourteenth Amendment. Respondents have moved for summary judgment.

The Supreme Court has recently discussed a prisoner's due process rights to discretionary parole. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 47 U.S.L.W. 4581 (May 29, 1979). The Court first concluded that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 4583. Moreover, even if the state creates a parole system, a prisoner's interest in obtaining parole is not, generally, protected by the due process clause.

> "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained. To that extent the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another pris-

on, a hope which is not protected by due process." (Emphasis in original.) (Citation omitted.) *Id.* at 4584.

However, in *Greenholtz*, the Court concluded that the language of the Nebraska statute in question created an expectancy of release "entitled to some measure of constitutional protection." *Id.* The court noted that the Nebraska statute is somewhat unique and that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." *Id.*

The Nebraska statute provides for an order of release unless certain factors are present. By contrast, the Illinois statute does not require release on parole but, rather, sets forth instances in which parole shall not be granted. Ill.Rev.Stat. ch. 38, §1003-3-5. Therefore, the court concludes that the Illinois statute creates no expectancy of release on parole which is protected by due process.

Further, even if petitioner's interest in parole is entitled to some due process protection, the court concludes that the requisites of due process have been met. Petitioner's only argument centers on the reason for the denial of parole: that the Board felt that release at this time would deprecate the severity of the crime for which he was convicted. This reason satisfies minimum due process requirements. *See United States ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 919 (1976); *United States ex rel. O'Connor v. MacDonald*, 449 F.Supp. 291 (N.D.Ill. 1978).

Finally, petitioner asserts that he is being denied due process and equal protection since he is not eligible for release under Ill.Rev.Stat. ch. 38, §1003-3-3(c). This provision is part of a new Illinois sentencing and release statute which eliminates parole and assigns each prisoner a mandatory release date. The release provisions are applicable to all persons sentenced after February 1, 1978.

The release provisions were also made applicable, by election, to some persons sentenced under the prior law. Ill.Rev.Stat. ch. 38, §1003-3-2.1. However, that section provides:

> "(b) No release date under this Section shall be set for any person sentenced to an indeterminate sentence under the law in effect prior to the effective date of this Amendatory Act of 1977 in which the minimum term of such sentence is 20 years or more."

Petitioner was sentenced prior to February 1, 1978, to a term of from 25 to 40 years. Therefore, he could not elect to have a release date set under §1003-3-2.1. He claims that this violates his rights to due process and equal protection.

The court has already concluded that petitioner has no protected entitlement to parole. Therefore, the fact that he is not entitled to mandatory release under the new law does not violate his right to due process.

Petitioner's equal protection claim also fails. As the Court stated in *McGinnis v. Royster*, 410 U.S. 263, 270 (1973), "the determination of an optimal time for parole eligibility . . . require[s] only some rational basis . . ."

> "We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose." *Id.*

In the present case, petitioner is treated differently than persons sentenced under the prior law to terms of less than twenty years. However, this distinction has as its rational basis the interest of the state in punishing serious crimes. *See Bel v. Chernoff*, 390 F.Supp. 1256, 1259 (D.Mass. 1975).

Further, though petitioner is also treated differently than those persons sentenced under the new law to terms of more than twenty years, the court concludes that he is not similarly situated with those persons. Judges apply different criteria in sentencing persons under the new law than they did under the prior law. For example, one of the differences is that under the new law, unlike the old law, parole is abolished. Further, the new law imposes determinate, rather than indeterminate, sentencing

and the length of sentences under the new law is different than under the old law. Thus, the court concludes that petitioner's rights to equal protection have not been violated.

Accordingly, respondents' motion for summary judgment is granted and petitioner's petition is dismissed.

ENTER: /s/ BERNARD M. DECKER
United States District Judge

DATED: August 27, 1979.

APPENDIX E

STATE OF ILLINOIS
PRISONER REVIEW BOARD ORDER
DOCKET NUMBER
49. DC

TO: THE WARDEN OR SUPERINTENDENT

The Prisoner Review Board has given due consideration to all reports and other factors in the case of:

NAME Willie Scott

NUMBER C-01420

FACILITY Stv.

The following order is your authority to release this individual on parole to the custody and supervision of the Office of Parole Services, or continued to hold for further action. If parole is ordered, said order is subject to being vacated prior to release to parole. Any release is contingent upon execution of Parole or Mandatory Supervised Release Agreement.

DATE August 30, 1978:

X Parole denied, continued to Aug. 79 X Docket

If you accept it, your release date will be none.

The Board's explanation of the basis for the decision will be forwarded to you next week.

PRISONER REVIEW BOARD

/s/ J. LONGO
/s/ J. IRVING
/s/ UNINTELLIGIBLE

STATE OF ILLINOIS
PRISONER REVIEW BOARD
JAMES R. IRVING, Chairman August 30, 1978

To: Willie Scott C-01420 Stateville

The basis for the Board's decision denying you parole at this time is explained as follows:

The above action is taken based on the Board's feeling that release at this time would deprecate the severity of the crime for which you were convicted, namely, Murder, receiving a 25-40 year sentence. Accordingly, your minimum sentence of 25 years, does not make you eligible to be provided with a release date under the new law.

tm

White: Board
Canary: Institution
Pink: Resident
Goldenrod: Clinical or Parole Services

PB 145 A

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLEN T. SANDERS,

Plaintiff-Petitioner,

v.

ILLINOIS PRISONER REVIEW BOARD, JAMES R. IRVING, Chairman, ILLINOIS PAROLE AND PARDON BOARD, and MARVIN REED, Warden, Stateville Penitentiary,

Defendants-Respondents.

No. 80 C 963

MEMORANDUM DECISION

In this combined civil rights, habeas corpus action plaintiff, Allen T. Sanders, alleges that the Illinois Prisoner Review Board violated his Fourteenth and Fifth Amendment due process rights when it denied him parole in 1977, 1978 and 1979 and that he was denied parole because he was engaged in the constitutionally protected action of guard house lawyering. Sanders seeks a new parole hearing, a declaration that his constitutional rights have been violated and immediate release from custody.

The facts are substantially undisputed. Sanders was indicted along with Ralph Bellamy for the murder and armed robbery of Chicago police officer Joseph Ferguson and the attempted murder and armed robbery of

Ferguson's partner Daniel Cambric. Sanders' motion for severance was granted and he was tried alone and found guilty of all charges by a jury in the Circuit Court of Cook County, Illinois. He was sentenced to 75 to 100 years' imprisonment on the murder charge and various lesser concurrent terms on the other charges.

Sanders became eligible for parole in 1977. He was denied parole in 1977 because "parole at this time would deprecate the seriousness of the offense and promote disrespect for the law." In 1978 he was denied parole for the same reason. In 1979, Sanders was denied parole for the third time. The basis for denial was again "the seriousness of [the] crimes [he had committed] murder, armed robbery and attempt murder." The Board added the additional reason that Sanders had been on parole when he committed the crimes for which he was currently serving time.

In April, 1979 Samuel Nolan, Acting Superintendent of Police for the City of Chicago, wrote to the Board and requested that Sanders not be released on parole. He stated that Sanders had shot and killed Ferguson in a wanton and cruel manner. Sanders was given a copy of that letter at the end of the 1979 hearing.

Sanders applied for a rehearing on the grounds that the Board had based its denial on false statements in Nolan's letter and on misleading statements in a report from the State's Attorney's office. He asked that the Nolan letter and the State's Attorney's report not be considered at the rehearing or, in the alternative, that he be given an opportunity to rebut that information. Sanders also asked that he be given access to his complete parole file. The Board denied Sanders' petition for rehearing stating that "[a]fter careful review of your request, along with the entire file in the matter, . . . '[t]he Board finds the information submitted does not warrant a rehearing. . . .'"

Sanders makes two constitutional claims: first that he was denied due process in his parole release hearing and second, that he was denied parole in retaliation for exercising his constitutional right of access to the courts.

To support his claim that his right to due process was violated in each of the three parole hearings Sanders alleges that: 1) the Board did not allow him access to his files or even that portion of his files which it relied on in denying him parole, 2) the Board relied on false and prejudicial information in denying him parole, and 3) the reasons given for denial of parole were in each instance constitutionally insufficient.

Respondents have moved to dismiss the § 1983 complaint and the § 2254 petition. In support of the motion respondents have filed supporting affidavits as well as copies of various papers from petitioner's file. Petitioner has similarly responded to the motion with matter outside the pleadings. We are now prepared to summarily decide the issues presented in this case. *See* Rule 12(b)(6), F.R.Civ.P., and 28 U.S.C. foll. § 2254 rules 8(a), 11.[1]

Respondents' motion to dismiss the due process claim is premised on two primary theories. First, they contend that no liberty or property interest is created by the Illinois parole statute and the petitioner is, therefore, not entitled to procedural due process protection. Second, they assert that if petitioner is entitled to due process protection, he would not be entitled to access to his entire master file or to a more specific reason for denial of parole than he was given. Respondents also contend that petitioner's allegations that he was denied parole because of false information in his file and as punishment for his activities in pending lawsuits against the Illinois Department of Corrections are unfounded.

The due process clause of the Fourteenth Amendment mandates procedural protections when government action deprives a person of a liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972). Thus, the first question we address is whether a liberty or property interest attaches to parole release considerations. The Supreme Court recently reviewed the applicability of procedural protections to parole release considerations in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). The Court

stated that the creation of a state parole system does not automatically confer on prisoners a liberty interest entitled to due process protection. However, the Court held that a state parole statute could raise an expectancy of parole entitling prisoners to some measure of constitutional protection. The Court went on to hold that although the unique structure and language of the Nebraska statute created such an expectancy, whether other states' parole statutes provide a protectible entitlement must be decided on a case-by-case basis.

The statute creating a parole system in Illinois has been amended a number of times since Sanders was convicted in December of 1970. One of the major facelifts occurred in 1973, three years after Sanders was convicted and four years before his first parole hearing. Another one occurred in 1978. The parties do not discuss these changes or their impact on Sanders' interest in parole release and we will not. Suffice it to say that an interest which is dependent upon statutory language may change with amendments to the statute.

In debating the liberty interest issue, petitioner and respondents focus their attention on the language of Ill. Rev. Stat., ch. 38, § 1003-3-5(c) (1977). The parties acknowledge that the name of the Illinois paroling authority was changed from the Parole and Pardon Board to the Prisoner Review Board by the 1978 amendment to § 1003-3-5(c) (1977). This is the only significant amendment to §1003-3-5(c). Respondents argue that the language of this section does not create the protectible expectation of parole which the Supreme Court found in the language of the Nebraska statute.[2] Petitioner claims that this section is a "mirror image" of the Nebraska statute:[3] "The only difference between the two is that Nebraska expressly states that a prisoner shall be parolled [sic] if the exceptions are not present, while in Illinois, it is the obvious implication of the statute." Petitioner's brief in opposition to the motion to dismiss at p. 6.

We do not agree with petitioner. The Nebraska statute provides that an eligible prisoner shall be released

unless one of the four exceptions is present. Nothing in the language of the Illinois statute precludes the Board from denying parole for a reason other than the three listed; nothing in the Illinois statute expressly mandates release of a prisoner. Indeed, the Illinois statute prohibits parole if one of the three conditions is present.

In light of the Supreme Court's opinion in *Greenholtz*, this difference between the Nebraska and Illinois parole statutes is not inconsequential.

As the Seventh Circuit said in a prison transfer context: "[A] prisoner is not constitutionally entitled to procedural protections unless . . . 'he has some justifiable expectation rooted in state law that [he will not be denied parole] absent the occurrence of a specified factual predicate.'" *Stringer v. Rowe*, 616 F.2d 993, 996 (7th Cir. 1980) (*quoting Arsberry v. Sielaff*, 586 F.2d 37, 45 (7th Cir. 1978)).

Although we conclude that the Illinois statute does not create a justifiable expectation of release, a liberty interest may also be created by rule or regulation. Our next step is to examine the Illinois rules and regulations which petitioner contends create an expectation of release. We are faced with the obstacle created by substantial changes in the Illinois paroling scheme and the parties' failure to address the effect of the changes. Petitioner has attached to his memorandum in opposition to the motion to dismiss the regulation governing an inmate's master files, Administrative Regulation 844 of the Department of Corrections, and a set of rules of the Prisoner Review Board. The regulation has nothing to do with parole except insofar as it permits an inmate to review those parts of his file relied upon by the "Disciplinary Committee, Assignment Committee, Merit Staff or Parole and Pardon Board to make a determination which results in an increase in the length of confinement—such as parole denial or revocation." This regulation does not create an expectation of release.

The rules of the Prisoner Review Board which petitioner has submitted do not create such an expectation

either. Furthermore, these rules could not have any effect upon Sanders' consideration for parole in 1977 since they did not become effective until February 1, 1978. (We also question their applicability to the 1979 hearing since the first page states that the rules are effective for a period not to exceed 150 days.) These rules provide the same three reasons for denying parole as § 1003-3-5 of the Illinois parole statute, *supra*. The regulations, however, go into greater detail in describing when the three "predictive categories" exist. The rules, like the statute, do not mandate release if the factors are not found, but prohibit release if they are found. Therefore, the structure and language of the rules do not create an expectation of release on parole, as petitioner suggests.

Accordingly, petitioner has failed to show that he was entitled to procedural due process in his 1977, 1978 and 1979 parole release decisions.

Petitioner next contends that he was denied substantive due process to which he was entitled. As the Court of Appeals for the Third Circuit recognized, the Supreme Court's holding in *Greenholtz*

> "does not stand for the proposition that once a state decides to provide that which it is not constitutionally compelled to offer, there are no constitutional limitations whatsoever on the basis for making decisions under the program. *See Maher v. Roe*, 432 U.S. 464, 468 (1977); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). To interpret *Greenholtz* as so holding would be to ascribe to that opinion the intent to initiate a major upheaval in due process jurisprudence.
>
> * * *
>
> "As the Supreme Court emphasized in *Perry v. Sindermann*, 403 U.S. 593 (1972) '[f]or at least a quarter-century [the Supreme] Court has made clear that even though a person has no "right" to a valuable government benefit and even though the gov-

ernment may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.' *Id.* at 597.

* * *

"The presence of a large measure of discretion in a parole system, . . . does not alter the fundamental due process limitation against capricious decision-making. A legislative grant of discretion does not amount to a license for arbitrary behavior. *Kent v. United States*, 383 U.S. 514, 533 (1966); *cf. Winsett v. McGinnes*, 617 F.2d 996, 1006 (3d Cir. 1980) (in banc), *petition for cert. filed sub nom. Anderson v. Winsett*, 49 U.S.L.W. 3001 (July 1, 1980) (No. 79-2014) (to be consistent with due process, discretion of prison authorities under Delaware work release program cannot be 'absolute' or 'unbridled'). Although *Greenholtz* indicates that a state may condition the expectation of parole, or even deny it completely, a state statute may not sanction totally arbitrary parole decisions founded on impermissible criteria.[2] Under the Supremacy Clause, a state statute may not vitiate the fundamental due process right to be free from arbitrary governmental action. See *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting). Thus, *Greenholtz* does not affect the vitality of the numerous cases holding that courts can review the substance of parole decisions, as distinguished from the adequacy of the procedures, to determine whether a parole board exercised its authority arbitrarily. See, e.g., *Zannino v. Arnold*, 531 F.2d 687 (3d Cir. 1976); *Calabro v. United States Board of Parole*, 525 F.2d 660 (5th Cir. 1975); *Clay v. Henderson*, 524 F.2d 921, 924 (5th Cir. 1975); *Childs v. United States Board of Parole*, 511 F.2d 1270 (D.C. Cir. 1974). Even if a state statute does not give rise to a liberty interest in parole release under *Greenholtz*, once a state institutes a parole system all prisoners have a liberty interest flowing directly from the due process

clause in not being denied parole for arbitrary or constitutionally impermissible reasons."

"2/ For example, it would not appear appropriate to suggest that the holding in *Greenholtz* gives parole boards a license to deny parole on the basis of race, religion, or political beliefs, or on frivolous criteria with no rational relationship to the purpose of parole such as the color of one's eyes, the school one attended, or the style of one's clothing."

Block v. Potter, 631 F.2d 233, 235-36 (3d Cir. 1980).

Petitioner claims that the Board acted arbitrarily and capriciously in denying him parole. In support of this contention petitioner alleges that when it denied him parole, the Board relied on facts characterizing his offense as fatally shooting a police officer when in fact his co-defendant had fired the fatal shot and that it denied him parole in retaliation for his participation in litigation concerning the conditions of confinement at Stateville. The latter allegation clearly states a valid claim. The Board may not deny parole in retaliation for the prisoner's participation in constitutionally protected activities when the denial has no rational relationship to the objectives of parole. *Cf. Montanye v. Haymes*, 427 U.S. 236, 244 (1976). However, respondents have submitted the affidavits of the nine members of the Board which denied petitioner parole. Every affiant states that he or she did not know of Sanders' activities as a "jailhouse" lawyer and that if he or she had known of those activities it would not have influenced his or her decision. Petitioner has not submitted any evidence or even a statement rebutting these affidavits, nor does he challenge the veracity of the affiants. We therefore conclude that no hearing on this issue is necessary, *see* 28 U.S.C. foll. § 2254, rule 8. Respondents' motion for summary judgment on this issue is granted.

Although the constitutional ramifications of relying on misstated facts is not as clear, we find that petitioner

has failed to state facts sufficient to justify a hearing or a conclusion that the Board's decision was arbitrary or even an inference that the facts are so clearly false that they should have been expunged from petitioner's file when he notified the Board of the errors in the statements. We are not confronted with a situation in which parole was allegedly denied on the basis that the inmate's file described his conviction as one for murder when in fact it was for stealing a loaf of bread. Sanders was convicted of murder and armed robbery. Even the Illinois Supreme Court's recitation of the facts in its opinion concerning Sanders' appeal does not reveal whether Sanders or his co-defendant, Ralph Bellamy, fired the fatal bullet. *People v. Sanders*, 56 Ill. 2d 241, 306 N.E.2d 865 (1974). Moreover, under the Illinois criminal code there is no legal distinction between firing the fatal shot and taking part in the commission of a forcible felony during which the fatal shot is fired. Both acts can constitute murder. *See* Ill. Rev. Stat., ch. 38, § 9-1. Similarly, the rules of the Board which petitioner submitted to us do not distinguish between firing the shot and felony murder. *See* Rule V(B)(1). We also note that in notifying the Board that the characterizations of his offense in Nolan's letter are in error, petitioner did not present the Board with any written evidence that he did not fire the shot. We find that on the facts alleged and the evidence presented petitioner has not stated facts sufficient to warrant a hearing on whether the Board acted arbitrarily in denying him parole. *See* 28 U.S.C. foll. § 2254, rule 8. For the foregoing reasons, the petition for a writ of habeas corpus is denied and the complaint is dismissed. Judgment will enter accordingly.

ENTER:

/s/ PRENTICE H. MARSHALL
United States District Judge

DATED: January 13, 1981.

[1] Shortly after Sanders filed his complaint and petition, he filed a motion for appointment of counsel. We denied the motion without prejudice to its renewal after the pending motion to dismiss was disposed of. Petitioner responded to the motion to dismiss and filed a motion to reconsider our decision with respect to the appointment of counsel and asked specifically that G. Flint Taylor, Esq. be appointed to represent him. We again denied his request. Sanders is being assisted in his efforts in this case by Mr. Taylor whose name appears on Sanders' brief in opposition to the motion to dismiss. Therefore we have not treated the motion and papers submitted therewith as we would had they been submitted by a *pro se* prisoner without assistance of counsel, although we have treated the allegations of his complaint and petition for a writ of habeas corpus with such liberality.

[2] The Nebraska statute, as quoted by the Supreme Court, provides:

> "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
>
> "(a) There is a substantial risk that he will not conform to the conditions of parole;
>
> "(b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> "(c) His release would have a substantially adverse effect on institutional discipline; or
>
> "(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later late." Neb. Rev. Stat. § 83-1, 114(1).

[3] The Illinois statute which petitioner contends creates an expectation of release provides:

> § 1003-3-5. *Hearing and determination*
>
> "(a) The Parole and Pardon Board shall meet as often as need requires to consider persons for parole. It may meet and order its actions in panels of 3 or more members. The action of a majority of the panel shall be the action of the Board. In consideration of persons committed to the Juvenile Division, the panel shall have at least a majority of members experienced in juvenile matters.
>
> "(b) If the person under consideration for parole is in the custody of the Department, at least one member of the

Board shall interview him, and a report of that interview shall be available for the Board's consideration. However, in the discretion of the Board, the interview need not be conducted if a psychiatric examination determines that the person could not meaningfully contribute to the Board's consideration. The Board may in its discretion parole a person who is then outside the jurisdiction on his record without an interview.

"(c) The Board shall not parole a person eligible for parole if it determines that:

"(1) there is a substantial risk that he will not conform to reasonable conditions of parole; or

"(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or

"(3) his release would have a substantially adverse effect on institutional discipline.

"(d) A person committed under the Juvenile Court Act who has not been sooner released shall be paroled on or before his 20th birthday to begin serving a period of parole under Section 3-3-8.

"(e) A person who has served the maximum term of imprisonment imposed at the time of sentencing less time credit for good behavior shall be released on parole to serve a period of parole under Section 5-8-1.

"(f) The Board shall render its decision within a reasonable time after hearing and shall state the basis therefor both in the records of the Board and in written notice to the person on whose application it has acted. In its decision, the Board shall set the person's release date, or if it denies parole it shall provide for a rehearing not more than 12 months from the date of denial. If the Board shall parole a person, and, if he is not released within 90 days from the date of the order granting parole, the matter shall be returned to the Board for review." P.A. 77-2097, § 3-3-5, approved July 26, 1972, eff. Jan. 1, 1973.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CLARENCE W. WALKER,

Plaintiff,

No. 79 C 623 vs.

JAMES IRVING, et al.,

Defendant.

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, DISTRICT JUDGE:

Plaintiff, an inmate of the Illinois State Penitentiary at Stateville, Joliet, Illinois, brings this *pro se* action challenging his denial of parole release by the Illinois Prisoner Review Board. Plaintiff invokes jurisdiction of the court under 28 U.S.C. §1343 (1976) and seeks injunctive relief. Before the court are the alternative motions of defendant James R. Irving, Chairman of the Illinois Prisoner Review Board, either to dismiss for failure to state a claim upon which relief may be granted or to grant summary judgment in his favor on the ground that no genuine issue as to a material fact exists. For the reasons hereinafter stated, the motion to dismiss will be granted.

Plaintiff challenges on due process grounds the practices followed by the Illinois Prisoner Review Board (Board) in deciding whether to grant a prisoner parole release.[1] Specifically, plaintiff alleges that he has been

[1] Plaintiff also alleges that the sentences he originally received (100-150 years for rape; 100-150 years for armed rob-

(Footnote continued on following page)

denied procedural due process by the failure of the Board to:

1. give him access to the information file upon which the decision is based; and
2. provide plaintiff with a written statement setting forth with specificity the facts upon which the Board relied in denying him parole.

The court will consider each of the procedural protections which plaintiff asserts to be constitutionally required.

I. *ACCESS TO FILE*

Plaintiff contends that he was denied due process because he was not given access to the information which the Board used in reaching its decision.

Illinois provides for discretionary parole. Ill. Rev. Stat. ch. 38, §1003-3-1 *et seq.* (Supp. 1978). In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, ... U.S. ....., 99 S. Ct. 2100 (1979), the Supreme Court held that the mere possibility of discretionary parole release is not protected by the Due Process Clause of the Fourteenth Amendment. *Id.* at 2105. The *Greenholtz* court declared, however, that a state's statutory mechanism of parole *may* provide an expectancy of release that entitles a prisoner to some measure of constitutional protection. *Id.* at 2106. In addition, this Circuit has asserted that the predicate necessary to trigger the Due Process clause may also be found in official state policies or practices. *Arsberry v. Sielaff*, 586 F.2d 37, 47 (7th Cir.

---

[1] *continued*

bery; and 19-20 years for attempted murder) were modified by the state. This court need not address this issue since where a state prisoner challenges the duration of his imprisonment and by way of relief seeks a determination that he is entitled to a speedier release, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The prisoner must, therefore, exhaust his state remedies before coming to federal court. *Id.*

1978); *Durso v. Rowe*, 579 F.2d 1365, 1369 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1033 (1979). Assuming, arguendo, that the Illinois parole statutes and/or official policies entitle a prisoner to constitutional protection,[2] the instant facts show that the plaintiff was not denied due process.

In *Greenholtz* a prisoner eligible for discretionary parole was permitted to appear before the Parole Board and present letters and statements on his own behalf. *Greenholtz*, *supra* at 2108. The Supreme Court declared that such a procedure "adequately safeguards against serious risks of error and thus satisfies due process." *Id.* at 2108. Similarly, Illinois requires at least one Board member to interview the prisoner, Ill. Rev. Stat. ch. 38, §1003-3-5(b) (Supp. 1978), and permits the prisoner to submit material to the Board. *Id.* § 1003-3-4(d). Therefore, because *Greenholtz* concluded that these procedures were sufficient to protect against error, plaintiff was not denied due process by the Board's denying him access to his file. *See also Dye v. United States Parole Commission*, 558 F.2d 1376 (10th Cir. 1977); *Williams v. Ward*, 556 F.2d 1143 (2d Cir. 1977); *Billiteri v. United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976).

II. *WRITTEN STATEMENT OF REASONS*

Plaintiff further alleges that he was not given a statement sufficiently setting forth the reasons for the denial of his parole and the facts upon which the Board relied in reaching its decision. Plaintiff has been eligible for parole three times since January, 1977. Each time he has come before the Board his parole has been denied. Attached to plaintiff's complaint is a copy of the Board's most recent order setting forth the reasons for the denial. The statement of reasons reads:

---

[2] This court expresses no opinion as to whether the Illinois parole statutes are structured so as to entitle a prisoner to constitutional protection. In addition, the record in this case is insufficient to determine the scope of Illinois policies and practices with respect to parole.

> The above action is taken based on the Board's feeling that parole at this time would deprecate the seriousness of the crimes for which you were convicted and would also promote disrespect for the law. This is based on the crimes of Rape, Armed Robbery and Attempted Murder of which you received sentences ranging from 100-150 and 19-20 years. Due to the 100 year minimum, you do not qualify for a release date under the provisions of the new law.

Plaintiff contends that the Board's reliance upon the serious nature of his offense is an inadequate reason for the denial of his parole release.

The due process clause requires at a minimum that state parole authorities furnish a prisoner who is denied parole a brief statement of the grounds upon which the decision is based. *Richerson v. Wolff*, 525 F.2d 797, 800 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976). In discussing these requirements, the *Richerson* court stated:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decisions . . . and the essential facts upon which the Board's inferences are based. . . .

Id. at 804, *quoting United States ex rel. Johnson v. New York State Board of Parole*, 500 F.2d 925, 934 (2d Cir.), *vacated as moot*, 419 U.S. 1015 (1974).

In light of this standard, the statement by the Board in this case is constitutional. The Board gave their reasons for denial of parole in terms of the statutory guidelines governing a parole decision.[3] It further bolstered its reci-

[3] Illinois Revised Statutes ch. 38, §1003-3-5(c)(2) (Supp. 1978) provides that "the Board shall not parole a person eligible for parole if it determines that . . . his release . . . would deprecate the seriousness of his offense or promote disrespect for the law. . . ."

tation of the statutory language that parole would deprecate the gravity of plaintiff's offense by making specific reference to the crimes for which plaintiff was convicted—rape, armed robbery and attempted murder. Moreover, the Board indicated the severity of the crimes plaintiff committed by explicitly stating the long sentences received. The facts alleged in this case show that the Board's decision was neither arbitrary nor based on an impermissible factor. "To require more detailed findings would be to require the Board to issue an opinion supporting its decision, rather than a mere statement of reasons for its actions." *Garcia v. United States Board of Parole*, 557 F.2d 100, 105 (7th Cir. 1977).

For the reasons stated, defendant's motion to dismiss is granted and the cause is dismissed.

/s/ MARVIN E. ASPEN,
United States District Judge

DATED: 10/18/79

APPENDIX H

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable FRANK J. MCGARR

Cause No. 80 C 337 Date January 24, 1980

Title of Cause Roger Burns v. James Irving, et al.

Brief Statement of Motion _____

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel _____

Representing _____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

Reserve space below for notations by minute clerk

Plaintiff brings this pro se complaint pursuant to 42 U.S.C. § 1983 alleging that defendants have violated his rights secured by the Fourteenth Amendment's due process and equal protection clauses by arbitrarily and discriminatorily denying him parole in five successive parole release hearings. For the reasons set forth in our recent opinion in *Parisie v. Irving*, 80 C 131 (N.D. Ill. Jan. 22, 1980), a copy of which is appended hereto, we deny plaintiff's motion for leave to proceed in forma pauperis. We note that the memorandum submitted in support of the instant complaint is virtually identical to the one submitted by the plaintiff in *Parisie*.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN S. PARISIE,

Plaintiff,

v.

JAMES IRVING, et al.,

Defendants.

No. 80 C 131

MEMORANDUM OPINION AND ORDER

Plaintiff brings this *pro se* action pursuant to 42 U.S. §1983 alleging that defendants have violated his constitutional rights by arbitrarily denying him parole in three successive parole release hearings. Before the court is plaintiff's motion for leave to file *in forma pauperis*.

In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, ... U.S. ....., 99 S.Ct. 2100 (1979), the Supreme Court held that, absent some state-created entitlement interest, the mere possibility of discretionary parole release is not protected by the Fourteenth Amendment's due process clause. Unlike the Nebraska statutes considered in *Greenholtz*, the Illinois statutory provisions governing parole release for prisoners serving indeterminate sentences, Ill.Rev.Stat. (Supp. 1978), Ch. 38, §1003-3-5, do not create a reasonable expectation of parole absent a requisite finding that a statutory justification for deferral of parole exists. As plaintiff points out in his complaint, the language of the relevant Illinois statute is phrased in the negative, thus leaving the decision to release an inmate who meets the minimal re-

quirements for parole to the unfettered discretion of the Illinois Prisoner Review Board. Because the statute does not give rise to an entitlement interest, plaintiff need not be accorded due process protections in parole release proceedings. Moreover, since the parole release decision "depends on an amalgam of elements, some of which are factual but many of which are purely subjective . . . ," *Greenholtz, supra* at 2105, we do not find the alleged disparity between the treatment of plaintiff and other prisoners convicted of murder to be of constitutional magnitude.

Finding plaintiff's complaint facially without legal merit, we deny plaintiff's motion for leave to file *in forma* pauperis. *Wartman v. Milwaukee County Court*, 510 F.2d 130 (7th Cir. 1975).

ENTER:

/s/ FRANK J. MCGARR
UNITED STATES DISTRICT JUDGE

DATED: January 22, 1980

APPENDIX I

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED: NOVEMBER 4, 1981
December 8, 1981

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

Before

Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge

ROGER A. BURNS,

Plaintiff-Appellant,

No. 80-1429 vs.

JAMES R. IRVING, Chairman of the Illinois Prisoner Review Board, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-337—**Frank J. McGarr**, *Judge.*

ORDER

Plaintiff filed his civil rights suit based on 42 U.S.C. Section 1983 alleging that defendant had violated his constitutional rights by arbitrarily denying him parole. The trial court denied him leave to proceed in forma pauperis on his complaint. The district court relied on *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 42 U.S. ..... (1979) [sic], in holding that the Illinois statutory provisions governing parole release for prisoners serving indeterminate sentences do not create an entitlement interest so that plaintiff need be accorded due process protections in parole release proceedings. The trial court denied plaintiff leave to proceed in forma pauperis on the ground that the complaint was frivolous.

On May 21, 1980 we granted plaintiff leave to proceed on his appeal from this dismissal order, on the basis of complete review of the briefs and record we conclude that the order of the district court was sound. Thus, the dismissal order is hereby affirmed.

APPENDIX J

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

SUBMITTED: JULY 8, 1981*
July 23, 1981

Unpublished Order
Not To Be Cited
Per Circuit Rule 35

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge

EUGENE L. NEWBURY,

Plaintiff-Appellant,

No. 80-2352 vs.

JAMES R. IRVING, Chairman of Prisoner Review Board,

Defendant-Appellee.

---

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P. (effective Aug. 1, 1979); Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-C-3728—James B. Moran, *Judge.*

ORDER

Plaintiff-appellant Eugene Newbury, an inmate at Stateville Correctional Center in Joliet, Illinois, appeals from an order of the district court denying his motion for leave to file his *pro se* civil rights suit *in forma pauperis.* We vacate the order of the district court and remand for further proceedings.

Under 28 U.S.C. § 1915(d) an individual may bring an action *in forma pauperis* in any court of the United States having jurisdiction over such action upon a showing that he is indigent. Leave to proceed *in forma pauperis* may be denied, however, if the action is frivolous or malicious. 28 U.S.C. § 1915(d); *Wartman v. Milwaukee County Court,* 510 F.2d 130, 134 (7th Cir. 1975).

Although the district court did not specifically so state in its order denying plaintiff leave to proceed, it apparently concluded that his action was frivolous. We disagree.

In his proffered complaint, plaintiff alleged that the Illinois Prison Review Board violated his Fourteenth Amendment right to due process of law by failing to provide him with an adequate statement of reasons for its decision to deny him parole. He claimed that the reason given by the Board, that release would deprecate the seriousness of his offense, was constitutionally insufficient and that a more detailed explanation for its decision was required.

The district court did not address the question of whether the reason given by the Board was constitutionally sufficient. Instead, it held that the Illinois statutes governing parole did not create a liberty interest within the meaning of the Constitution and that, therefore, under the reasoning of *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979), due

process did not apply. On that basis, it denied plaintiff leave to proceed *in forma pauperis*.

We think the district court proceeded too hastily in deciding what is potentially a question of major significance for the State of Illinois. In *Greenholtz*, the Supreme Court held that, although a state's establishment of a parole system does not by itself create a constitutionally protected liberty interest, such an interest may be created by the state statutes governing parole determinations. The Court held in *Greenholtz* that the Nebraska statutes did create such an interest. It cautioned, however, that "whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12.

We are not unmindful of the differences between the Nebraska and Illinois statutes governing parole determinations. It may well be true, as the district court held, that these differences are so significant that Illinois' statutes, unlike Nebraska's, do not create an interest sufficient to invoke the guarantees of due process. It may also be true that, even if due process does apply to Illinois parole determinations, the reason given by the Board for denying plaintiff's request is constitutionally adequate. We intimate no view on either of these issues. Even if we were inclined to do so we would have to undertake the task without the aid of briefing from the named defendants who did not file briefs, jurisdiction never having been acquired over them.

We do believe, however, that neither issue has so little merit that plaintiff's request to proceed *in forma pauperis* should have been denied. As the well-written brief prepared at this court's request by Professor Gary H. Palm of the University of Chicago Law School makes clear, a rational argument can be made in support of plaintiff's position. For this reason and because of the possible impact this case could have on all Illinois parole determinations, we think the district court should have allowed plaintiff to proceed with his claim so that it could be more fully considered. We therefore vacate the district court's order and remand for further proceedings.

APPENDIX K

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 79-2131

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

vs.

ILLINOIS PAROLE AND PARDON BOARD, et al.,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79 C 860—**Bernard M. Decker**, *Judge*.

NOTICE

TO: Gary H. Palm
Mandel Legal Aid Clinic
6020 South University Avenue
Chicago, Illinois 60637

PLEASE TAKE NOTICE that on April 28, 1982 I have filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, a Motion for Leave to Cite Additional Authority, a copy of which is enclosed herewith.

TYRONE C. FAHNER
Attorney General
State of Illinois

BY: /s/ TERENCE M. MADSEN
Assistant Attorney General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

The undersigned being duly sworn upon oath deposes and states that a copy of the above Notice and Motion were served upon the above-named party on April 28, 1982 by depositing such copies in the U.S. mail at 160 N. LaSalle Street, Chicago, Illinois, in an envelope bearing sufficient postage.

/s/ _____

SUBSCRIBED AND SWORN to
before me this 28th day
of April, 1982.

/s/ _____
NOTARY PUBLIC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 79-2131

UNITED STATES OF AMERICA ex rel. WILLIAM SCOTT,
Petitioner-Appellant,

vs.

ILLINOIS PAROLE AND PARDON BOARD, et al.,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 79 C 860—Bernard M. Decker, *Judge.*

MOTION FOR LEAVE TO CITE ADDITIONAL AUTHORITY

Respondents, by their attorney, TYRONE C. FAHNER, Attorney General of the State of Illinois, move this Court for leave to cite five additional decisions in support of propositions presented in the Petition for Rehearing and Suggestion for Rehearing In Banc. The respondents seek to cite the following cases:

1. *U.S.A. ex rel. Heirens v. Irving*, No. 80-3072 (C.D. Ill. 1980) and *Ware v. Kaufman*, No. 80 C 3209 (N.D. Ill. 1981), should be cited following *Parisie* in fn. 2, on page 4.
2. *Harris v. Irving*, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980) should be cited following *Tucker* on page 7.
3. *Bowles v. Tennant*, 613 F.2d 776 (9th Cir. 1980); *Griffith v. Detrich*, 603 F.2d 118 (9th Cir. 1979); and, *Booth v. Hammock*, 605 F.2d 661 (2nd Cir. 1979) should be cited following the *Greenholtz* cite to 442 U.S. at 11, on page 6.

In support of this motion the respondents state that these cases came to counsel's attention only after the filing of the Petition for Rehearing and Suggestion for Rehearing In Banc and are important to this Court's full and fair consideration of the issues presented.

WHEREFORE; Respondents move the Court for leave to cite additional authority as set out in this motion.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

BY: /s/ TERENCE M. MADSEN
Assistant Attorney General
188 W. Randolph St., Suite 2200
Chicago, Illinois 60601
(312) 793-2570

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA ex rel. WILLIAM HEIRENS,
Plaintiff,

v.

JAMES IRVING, et al.,
ILLINOIS PRISON REVIEW BOARD,
Defendants.

NO. 80-3072

MEMORANDUM ORDER

This is a civil action filed by plaintiff, William Heirens, a prisoner at the Vienna Correctional Center at Vienna, Illinois. The sole question presented by the complaint relates to the retroactive application to the plaintiff of a specific provision of Illinois' statutory paroling criteria, Ill. Rev. Stat. ch. 38, § 1003-3-5(c)(2). The plaintiff alleges that allowing the parole authorities to consider the seriousness of the offense of which the plaintiff was convicted, a criterion enacted after plaintiff's sentencing, effectively enhances the plaintiff's punishment in violation of the *ex post facto* prohibitions of the Illinois and United States Constitutions. Currently before this Court is a Motion to Dismiss, or, in the alternative, for Summary Judgment filed by the defendants.

In 1946, William Heirens pled guilty to various offenses, including three murder charges, and was sentenced to three consecutive life sentences, as well as a consecutive one year to life sentence for lesser offenses. At the time of plaintiff's sentencing, parole authorities were vested with total discretion in granting paroles.

The only statutory guideline was as follows: "In consideration of any application for parole due consideration and weight shall be given to the record of the prisoner's conduct kept by the superintendent or warden." Ill. Rev. Stat. ch. 38, § 808A (1945). In 1973, many years after the plaintiff's sentencing and incarceration, the Illinois legislature adopted the Unified Code of Corrections, which provides:

> c) The Board shall not parole a person eligible for parole if it determines that:
>
> (1) there is a substantial risk that he will not conform to reasonable conditions of parole; or
>
> (2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law; or
>
> (3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. ch. 38 § 1003-3-5(c). The Illinois statutory parole criteria was based upon the Model Penal Code's parole criteria. Other jurisdictions, most importantly the federal system, have also adopted the Model Penal Code's parole criteria, with some variation in language.[1] *See*, 18 U.S.C. § 4206.

---

[1] The U.S. parole criteria is as follows:

> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

18 U.S.C. § 4206 (1976).

The plaintiff alleges that he has fulfilled all of the special deterrent paroling criteria in effect at the time he was sentenced, and that the only reason he is currently being denied parole is the parole authorities' consideration of the second criterion above stated, which was enacted after his sentencing. This argument is factually supported by Exhibit I attached to the complaint, a Prisoner Review Board Order indicating that the plaintiff was denied parole on November 27, 1979, because his release on parole would deprecate the seriousness of the offense or promote disrespect for the law. Plaintiff contends that this second criterion is based upon general deterrent theories prohibited by Illinois law, and that application of a general deterrent criteria after sentencing is *ex post facto* in nature.

The thrust of the defendant's Motion for Summary Judgment is that parole is a matter of clemency and grace, not a matter of right. *See, People v. Pace*, 362 Ill. 224 (1935). A retroactive change in the parole criteria, therefore, would not violate the plaintiff's substantive rights in that the prisoner remains subject to the same sentence, with parole altering only the method and degree of confinement during the period of commitment. In support of their position, defendants rely primarily upon *People ex rel. Kubala v. Kinney*, 25 Ill.2d 491, 494 (1962), where the Supreme Court of Illinois held that the legislature may change the terms and conditions for parole and make such change immediately applicable to those sentenced prior to the date of the change. Retroactive application of laws governing the terms and conditions for parole is permissible because parole is an act of clemency and grace.

The United States Supreme Court has recently held that not every law passed after a conviction is unconstitutional under Article I § 10 of the United States Constitution, which prohibits a State from passing any "ex post facto Law":

> It is equally well settled, however, that 'the inhibition upon the passage of *ex post facto* laws does not

> give a criminal a right to be tried in all respects by the law in force when the crime charged was committed.' *Gibson v. Mississippi*, 162 U.S. 565, 590 (1896). The constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy v. South Carolina*, 237 U.S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance. *Beazell v. Ohio* (269 U.S. 167), at 171.
>
> *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

A procedural change in the law, even though it has a detrimental impact upon the defendant, is not *ex post facto*. A procedural change does not make criminal a theretofore innocent act, nor does it make the punishment for a crime more burdensome, nor does it deprive one charged with crime of any defense available according to law at the time when the act was committed. *See, Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925). The test is whether the later standard of punishment is more onerous than the earlier. *See, Lindsey v. Washington*, 301 U.S. 397, 400 (1937).

In *Portley v. Grossman*, 444 U.S. 1311 (1980), the Supreme Court considered the question of whether application of reparole guidelines in effect at the time of parole eligibility rather than the guidelines in effect at the time of sentencing violated the Constitutional prohibition against *ex post facto* laws. Reaffirming its holding in *Dobbert v. Florida, supra*, the court stated at p.1312 that:

> [T]he prohibition of *ex post facto* laws does not extend to every change of law that may work to the disadvantage of a defendant. It is intended to secure 'substantial personal rights' from retroactive deprivation and does not 'limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'

Significantly, the court noted that because parole is a matter committed to agency discretion under federal

law, the terms of the sentence originally imposed were not altered. The burden of punishment remained the same in that the applicant for reparole could not be held in confinement beyond the term imposed by the judge. Because the guidelines did not deprive the applicant of any pre-existing right or enhance the punishment imposed, the court concluded that the change in the guidelines was in the nature of a procedural change.

It is my opinion that the paroling criterion at issue in the instant case, Ill. Rev. Stat. ch. 38 § 1003-3-5(c)(2), is not violative of the *ex post facto* prohibitions of the Illinois and United States Constitutions. The change in the statute governing paroling criteria is merely a procedural one. Analysis of the Illinois statute in light of recent federal decisions indicates that there is no substantive right to parole under the law of the state. Therefore, a change in the statute governing parole criteria does not affect a substantive right given to a prisoner in Illinois. Further, the present statute does not make the punishment for the crime more burdensome than previous law. It is for these reasons, to be explained hereafter, that plaintiff is not entitled to relief under 42 U.S.C. § 1983.

> I. The change in the statute governing parole criteria was a procedural one in that it affected no substantive right given to the prisoner under Illinois law.

Neither the statute in effect at the time plaintiff was sentenced, nor the current statute, confers upon the prisoner a right to parole once he becomes eligible by statute. The statute in effect at the time plaintiff was sentenced, Ill. Rev. Stat. ch. 38 § 808a (1945), is set forth as follows, in pertinent part:

> The Division of Correction in the Department of Public Safety shall exercise and discharge all the rights, powers and duties heretofore vested in the parole board and in the Department of Public Welfare in granting parole to persons sentenced or committed for crimes or offenses and in the supervision and aftercare of persons so paroled. The

> action of a majority of all the members of the Division of Correction shall be the action of said Division. No parole shall be granted except upon the concurrence of a majority of all the members of the Division of Correction. . . .

The Illinois statute now in effect, Ill. Rev. Stat. ch. 38 § 1003-3-5(c), precedes the list of three paroling criteria with the following words: "The Board shall not parole a person eligible for parole if it determines that: . . . ." These words are a significant departure from the words preceding the criteria as stated in the American Law Institute's Model Penal Code, Section 305.9, upon which the Illinois law is based. The phrasing of the Model Penal Code is: "(1) Whenever the Board of Parole considers the first release of a prisoner who is eligible for release on parole, *it shall be the policy of the Board to order his release*, unless the Board is of the opinion that his release should be deferred because . . ." (emphasis supplied). The Illinois statute vests discretion in the Board to grant or deny parole at the first parole eligibility hearing. However, the Board may not parole if any of the criteria cannot be met. The language of the Model Penal Code, on the other hand, grants to the prisoner at this first parole eligibility hearing the right to release on parole, unless one of the criteria cannot be met.

Recent federal decisions in which similar statutory paroling criteria were examined, look to the language of the statute to determine whether that statute grants to the prisoner a right to parole. In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1978), the Supreme Court of the United States interpreted the Nebraska statutory parole criteria,[2] ex-

---

[2] Nebraska parole criteria is as follows:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(Footnote continued on following page)

tremely similar in its language to the Model Penal Code, to create a protectible expectation of parole. This right to parole, which was conferred by the state, was held to be a sufficient liberty interest to entitle the inmates to due process protections. The court agreed with the inmates that the structure of the provision, along with the use of the word "shall", binds the Board of Parole to release an inmate unless one of the four designated reasons are found.

The Seventh Circuit, in interpreting Indiana statutory paroling criteria, found no right to parole which required application of the strictures of due process in *Averhart v. Tutsie*, 618 F.2d 479 (1980). The *Averhart* court first differentiated the language of the Nebraska statute interpreted in *Greenholtz* from the language of the Indiana statute. The court found that the Indiana parole release statute creates no expectancy of release.[3]

---

[2] *continued*

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Neb. Rev. Stat. § 83-1,114 (1) (1976).

[3] Indiana parole criteria is as follows:

(a) The Indiana parole board is authorized to release on parole, pursuant to the laws of Indiana, any person confined in any penal or correctional institution in this state except persons under sentence of death. It shall conduct hearings at each correctional institution at such time as may be necessary for a full study of the cases of prisoners eligible for release on parole and to determine when and under what conditions and to whom parole may be granted. All paroles shall issue upon order of the board, duly adopted. . . .

. . . .

(Footnote continued on following page)

In addition, the Seventh Circuit in *Averhart* pointed out that in accordance with *Bishop v. Wood*, 426 U.S. 341, 344 (1976), the "sufficiency of the claim of entitlement must be decided by reference to state law." The Indiana Supreme Court had interpreted the parole release statute in *Murphy v. Indiana Parole Board*, 397 N.E.2d 259, 263 (1979) as follows:

> Our parole release statute creates no expectancy of release as envisioned in the Nebraska statutory scheme; rather, our Legislature has invested the Parole Board with almost total discretion in such matters.

The Illinois Supreme Court has not interpreted the specific statute here involved. Therefore, the question of whether the Illinois law confers a right to parole, once eligible, must be determined by means of previous decisions and by means of examination of the language of the statute. First, the Illinois Supreme Court has repeatedly referred to the act of parole as a matter of clemency and grace. *People v. Pace*, 362 Ill.2d 224 (1935); *People ex rel. Kubala v. Kinney*, 25 Ill.2d 491 (1962); *People v. Nowak*, 387 Ill. 11 (1944). Secondly, the wording of the Illinois statute appears to confer no entitlement to parole for the inmate. It does not approximate the language of the uniquely structured Nebraska statute, *See, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1978), but

---

[3] *continued*

> (c) Before ordering the parole of any prisoner, the Indiana parole board shall have the prisoner appear before it, and shall interview him. A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered to be a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment, or for his maintenance and care, and only when the Indiana parole board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. . . .

Ind. Code § 11-1-1-9.

instead vests in the Board discretion in deciding whether an inmate shall be released. Because the plaintiff here possessed no right to parole under the law of the state, no "substantial right" is involved which might trigger application of the *ex post facto* prohibitions. *See, Dobbert v. Florida, supra.*

II. The change in the statute governing parole criteria was a procedural one in that it did not make the punishment for the crime more burdensome.

A law is merely procedural in effect and does not violate the *ex post facto* prohibitions of the Illinois and United States Constitutions where it does not make the punishment for the crime more burdensome. *See, Dobbert v. Florida, supra.* Plaintiff asks that this court find that the Illinois statute makes his punishment more burdensome. The portion of the statute of which plaintiff complains, Ill. Rev. Stat. ch. 38, § 1003-3-5(c)(2), allows the parole board to deny parole on the basis that parole at that time might deprecate the seriousness of the offense or promote disrespect for the law. Analysis of cases dealing with the *ex post facto* implications of statutes similar to that of Illinois, notably the federal parole guidelines, and application of the facts of the instant case, persuade this court that the Illinois statute does not violate the Constitutional prohibition as applied to plaintiff.

Extensive examination of caselaw dealing with the *ex post facto* effect of paroling criteria, whether statutory or administrative in form, reveals that the Circuits exhibit differing concerns premised upon the facts of the individual case. Those cases in which the facts indicate a denial or postponement of a parole hearing formerly available to the prisoner at the time of sentencing, are those which are found to violate the ex post facto prohibition of the Constitution. *See, Warden v. Marrero*, 417 U.S. 653 (1973); *Greenfield v. Scafati*, 277 F. Supp. 644 (D.C. Mass. 1967), *aff'd mens.* 390 U.S. 713 (1968); *Rodriguez v. United States Parole Comm.*, 594

F.2d 170 (7th Cir. 1979); *Cox v. Benson*, 548 F.2d 548 (7th Cir. 1977). If deprivation or postponement of a parole hearing is not the issue in the case, the circuits have decided on a case-by-case basis whether the law is *ex post facto*, focusing in each case upon whether the new statute made the punishment for the crime more burdensome.

The Third Circuit's concern in *Geraghty v. U.S. Parole Commission*, 579 F.2d 238 (3rd Cir. 1978), was that the prisoner did not receive individualized consideration as to the severity of the offense. At the time of Geraghty's sentencing, he was eligible for parole. However, by the time of his first parole hearing, Geraghty claimed that the Commission had established a customary time to be served for prisoners who had committed crimes as "severe" as the one for which he was convicted. The Commission, on the other hand, alleged that it undertook individualized consideration of prisoners' applications, similar to that consideration given before the guidelines went into effect. On the basis of these facts, the court stated at page 266:

> It is clear that the legislature could not retroactively, without offending the *ex post facto* clause of the Constitution, substantially decrease parole eligibility by legislation . . . And to maintain that the present parole guidelines enact no substantial limitation on parole eligibility may well be to misinterpret both the legal and practical effects of the guidelines.

However, because there was a controverted issue of material fact as to the method for determination of parole eligibility, the court determined that the case was inappropriate for summary judgment. The implication of the decision is that if the Board gave individualized consideration to each prisoner's application, refusing to apply a customary time period for service in each case, the law might not be considered *ex post facto* in nature.

The Supreme Court of the United States took this issue on certiorari in *U.S. Parole Comm. v. Geraghty*, No. 78-572 (March 19, 1980), but subsequently declined to decide it, saying at footnote 1, p. 1:

> The grant of certiorari also included the question of the validity of the Parole Release Guidelines, an issue left open in *U. S. v. Addonizio*, 442 U.S. 178, 184 (1979). We have concluded, however, that it would be premature to reach the merits of the question at this time.

The Sixth Circuit in *Ruip v. U.S.*, 555 F.2d 1331, 1334 (1977), looked to the traditional definition of an *ex post facto* law found in *Calder v. Bull*, 3 U.S. 386, 390 (1798), which states that a law falls within the prohibition on *ex post facto* laws if it:

> makes an action done before the passing of the law, and which was innocent when done, criminal; or . . . changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.

The court then noted that the statutes which apply in determining parole eligibility were entirely different statutes from the law annexed to the crime, in that case bank robbery. Further, the court held that the administrative guidelines did not have the characteristics of law and were not encompassed in the prohibition on *ex post facto* laws since they merely clarified the exercise of administrative discretion.

The Seventh Circuit in *Garcia v. U.S. Board of Parole*, 557 F.2d (1977), held that the board did not abuse its discretion in denying Garcia parole solely because his release would deprecate the seriousness of his offense. That case merely established that offense severity is sufficient to deny parole and did not deal with any *ex post facto* implications of the statute.

In its discussion of the Indiana parole guidelines, the Seventh Circuit in *Averhart v. Tutsie*, 618 F.2d 479 (1980), interpreted the Supreme Court's decision in

Greenholtz, supra, as recognizing that parole determinations must necessarily include the seriousness of the offense. In addition, the *Averhart* court found no violation of the double jeopardy prohibition of the Constitution as a result of denial of parole because of the seriousness of the offense. The court held that the denial of parole merely perpetuates the *status quo* where state law does not give the prisoner a right to parole; that is, "the prisoner remains incarcerated under a validly imposed sentence." *Averhart, id.* at p. 483.

In the instant case, plaintiff has not been denied a parole eligibility hearing, nor has any hearing been postponed. No claim has been made that his application was denied individualized consideration. The presence of these factors might require that this court find the Illinois statute violative of the *ex post facto* prohibition of the Constitution.

In final analysis then, this court must look to Illinois law to determine whether the statute involved makes the punishment of the plaintiff more burdensome than that of the previous law in effect at the time of plaintiff's sentencing.

Under Illinois law at the time of plaintiff's sentencing, the Division of Correction was vested with total discretion in the decision of granting or denying parole. Ill. Rev. Stat. ch. § 808(a)(1945). The only directive from the legislature was that "due consideration and weight was to be given to the record of the prisoner's conduct." Consideration of other factors in making the parole decision was not prohibited by statute and, in fact, it is likely that multiple factors were weighed by the Commission in making the final determination. The parole decision made under the law in effect at the time of plaintiff's sentencing was an arbitrary one.

The promotion of respect for the law has always been a legitimate consideration in law-making for any state or nation which abhors anarchy and desires the rule of law. In addition, a state has a legitimate concern in considering the seriousness of the offense committed in

order that it may safeguard society from repetition of heinous crimes.

The total discretion given to the Parole Commission statutorily and in caselaw at the time of Heirens' sentencing included these traditional considerations which plaintiff deems of a general deterrent nature, together with consideration of the record of the prisoner's conduct while incarcerated. The final determination of the grant or denial of parole was totally discretionary, "a matter of clemency and grace," *Kubala v. Kinney, supra*, and based upon many factors. The current paroling criteria, Ill. Rev. Stat. ch. 38 § 1003-3-5(c), also vests in the Parole Board discretion in the paroling decision, and considers the seriousness of the offense and the effect upon the public of the early release of a criminal whose crime was a serious one. Therefore, I find that present Illinois law has merely clarified the previous law, and had not altered any considerations for parole release. The punishment is not more burdensome to plaintiff under current law. In fact, because the current law is less arbitrary in application, it may enhance a prisoner's chance of parole.

Additionally, plaintiff's punishment for his crimes has not been increased by the denial of parole. Plaintiff entered a plea of guilty to three murders as well as lesser offenses and was sentenced by the judge. Plaintiff cannot be held in confinement beyond the term imposed; therefore, his sentence has not been increased beyond the term of the sentence set by the judge. Parole would alter only the method and degree of confinement during the period of commitment.

Plaintiff here asserts some type of wrongfulness in the consideration of the seriousness of the offense and the promotion of respect for the law, factors which he terms general deterrent factors. Instead, he urges, only the goal of rehabilitation of the offender may rightfully be considered in the parole decision made by a parole board.

The legislative history of the federal paroling criteria, 18 U.S.C. § 4206 (1976), also based upon the Model Penal Code's recommended criteria, not only refutes plaintiff's assertions but illustrates that Congress emphasized the need for the balancing of general deterrent factors and special deterrent factors in making the final parole determinations. The prerequisites to parole under the Senate version of the legislation were that there be a reasonable probability that the person would remain at liberty without violating the law, and that release not be incompatible with the welfare of society. In the Conference Report, the result of compromise between the House and Senate versions, parole was characterized as an extension of the sentencing process in which the parole decision makers must:

> [W]eigh the concepts of general and special deterrence, retribution and punishment, all of which are matters of judgment . . . and come up with determinations of what is meant by 'would not depreciate the seriousness of the offense or promote disrespect for the law' that, to the extent possible, are not inconsistent with findings of other parole decisions.

Conference Report, 1976 U.S. Code, Cong. and Admin. News p. 26, 358. The final version of the federal law requires that a prisoner not be released if the Commission determines that release would jeopardize the public welfare. *See*, 18 U.S.C. § 4206(2).

Plaintiff is not entitled to relief as a result of any violation of the *ex post facto* prohibition of the Constitution. The statutory paroling criteria of Illinois gives the prisoner no right to parole once he becomes eligible by statute. Because there is no right to parole, a change in parole criteria is merely procedural. Further, where the current statute does not make the punishment for the crime more burdensome than previous law, the change is merely procedural. Under the previous law, the board had discretion to consider any factor, and parole was merely a matter of clemency and grace. Current law merely sets forth standards which may have been consid-

ered under previous law. Therefore, the later standard of punishment is not more onerous than the earlier, and subsequent law merely perpetuates the *status quo*. Consequently, the specific paroling criteria upon which plaintiff's claim is based, Ill. Rev. Stat. ch. 38 § 1003-3-5(c)(2), is not, in its application to plaintiff, unconstitutional but is merely a procedural change not violative of the *ex post facto* prohibitions under *Dobbert v. Florida*, *supra*. Defendants' Motion for Summary Judgment is hereby granted.

Enter this 4 day of December, 1980.

/s/ J. WALDO ACKERMAN
United States District Judge

APPENDIX L

Case Name	Number	Court
Bradley v. Fairman	82-2085	(C.D. Ill.)
Graham v. McCombs	82-3100	(S.D. Ill.)
Clouser v. McGinnis	82-3137	(C.D. Ill.)
U.S. ex rel. Louis Toney Allen v. Joseph McComb	82 C 3689	(N.D. Ill.)
Sobacki v. Illinois Prisoner Review Board	82-3105	(S.D. Ill.)
U.S. ex rel. Ganter v. Fairman	82 C 3872	(N.D. Ill.)
U.S. ex rel. Akbar v. Fairman	82 C 1608	(N.D. Ill.)
U.S. ex rel. Mitchell v. McComb	82 C 3962	(N.D. Ill.)
U.S. ex rel. Talach v. Illinois Prisoner Review Board	82 C 1988	(N.D. Ill.)
U.S. ex rel. Goss v. McCombs	82 C 3845	(N.D. Ill.)
U.S. ex rel. Davenport v. McCombs	82 C 4357	(N.D. Ill.)
U.S. ex rel. Lewis v. Prisoner Review Board	82 C 3251	(N.D. Ill.)
U.S. ex rel. Horton v. Irving	82 C 2569	(N.D. Ill.)
U.S. ex rel. Edwards v. Fairman	82 C 2389	(N.D. Ill.)
U.S. ex rel. Jones v. Gramley	82 C 2992	(N.D. Ill.)
U.S. ex rel. Lockett v. Lane	82 C 4416	(N.D. Ill.)
U.S. ex rel. Blount v. McComb	82 C 3688	(N.D. Ill.)
U.S. ex rel. Bunting v. McGinnis, et al.	82 C 4830	(N.D. Ill.)
U.S. ex rel. Townsend v. McGinnis	82 C 4831	(N.D. Ill.)
U.S. ex rel. Hinton v. Fairman	82 C 4725	(N.D. Ill.)
U.S. ex rel. Allen v. McComb	82 C 4591	(N.D. Ill.)
Amin Asad a/k/a Henry Thompson v. McComb	82 C 2089	(N.D. Ill.)
U.S. ex rel. Jacobs v. DeRobertis	82 C 4356	(N.D. Ill.)
U.S. ex rel. Johnson v. Fairman	82 C 2811	(N.D. Ill.)
U.S. ex rel. Leonard v. McGinnis	82 C 1986	(N.D. Ill.)
U.S. ex rel. Mallett v. Fahner	82 C 1295	(N.D. Ill.)
U.S. ex rel. McCalvin v. Irving	80 C 1522	(N.D. Ill.)
U.S. ex rel. Rogers v. Illinois Prisoner Review Board	82 C 2415	(N.D. Ill.)

APPENDIX M

STATE OF ILLINOIS
DEPARTMENT OF CORRECTIONS
PAROLE AND PARDON BOARD ORDER

DOCKET NUMBER
DC EN BANC Carb. W/P

TO THE WARDEN OR SUPERINTENDENT

last f/f Sept. Dkt.

The Parole and Pardon Board has given due consideration to all reports and other factors in the case of:

NAME William Witherspoon
NUMBER C25214
FACILITY Sheridan

The following order is your authority to release this individual on parole to the custody and supervision of the Office of Field Services, or continued to hold for further action. If parole is ordered, said order is subject to being vacated prior to release to parole and is contingent upon execution of Parole Agreement.

DATE October 13, 1977

X Parole denied, continued to August 1980

X Docket

THE BOARD GAVE THE FOLLOWING IN EXPLANATION OF THEIR DECISION:

The Board recognizes the unusually good display of institutional adjustment and presumed rehabilitation in your case, but must also consider the nature of the offense, the killing of a uniformed policeman, your fourth felony offense. Thus, you must be regarded as an habitual offender, the gravity of which offense precludes favorable parole consideration at this time.

APPENDIX N

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

Amendment X of the United States Constitution provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV of the United States Constitution provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 11 of the Illinois Constitution of 1970 provides that:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

STATUTORY PROVISIONS

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) provides, in pertinent part, that:

Parole shall be denied if the board finds:

(1) There is substantial risk that [the prisoner] will not conform to reasonable conditions of parole; or

(2) his release at that time would deprecate the seriousness of his offense or promote disrespect for the law, or

(3) his release would have a substantially adverse effect on institutional discipline.

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5 provides, in pertinent part, that:

(f) The Board shall render its decision within a reasonable time after hearing, and shall state the basis therefor both in the records of the Board and in written notice to the person on whose application it has acted. In its decision, the Board shall set the person's time for release, or if it denies parole it shall provide for a rehearing not more than twelve months from the date of denial. If the Board shall parole a person, and, if he is not released within 90 days from the effective date of the order granting parole, the matter shall be returned to the Board for review.

ADMINISTRATIVE REGULATIONS

IV. THE PAROLE HEARINGS

A. Panels

Panels of members of the Prisoner Review Board shall hold hearings at the various institutions and facilities each month. Interviewing members of the Board will hear those cases of persons whose names appear on the respective dockets for hearing.

B. Appearance and Notices

Fifteen days or otherwise reasonably prior to the first hearing of felony cases, notices shall be given by the Board to the State's Attorney of the county from which the person was committed

and to the complaining witnesses (aggrieved parties).

Interviewing members will hear applications and shall consider written responses, correspondence and summary reports of interviews of persons who support or oppose parole or, where requested, allow such persons to make personal appearances.

An interviewing member may administer an oath to the prospective parolee and to any person who appears to be heard.

The Board may in its discretion consider and parole a prospective parolee, who is then outside the jurisdiction of Illinois, on his record without a personal interview, which may be waived by the prospective parolee.

C. Records Access

A parole candidate shall have access to all documents which the Board considers in denying parole or setting a release date. If such documents have not been disclosed to the candidate before the interview, they shall be disclosed to him during the interview. If, in light of the documents, the candidate so desires, he shall be granted a 30-day continuance.

D. Conference

1. At the conclusion of the interview, the interviewing Board member or members who interviewed the prospective parolee shall make a summary report of pertinent information concerning:
   a) The institutional records.
   b) The interview of the individual.
   c) Those who appeared or addressed comment to the Board.
2. The members of the Board shall meet in conference at the institution or facility and consider the cases of all persons heard on the respective docket. In addition to the sum-

mary report of the Board member concerning the interview, the panel shall consider the following:

a) Material submitted by the clerk of the committing court at the time of commitment to the Department of Corrections, including the sentence or adjudication, any pre-sentence reports and the statement by the State's Attorney and any statement by the attorney who represented the applicant at his original sentencing.

b) The clinical evaluation prepared by the Department of Corrections at the time of commitment.

c) Any report by the Department and the chief administrative officer concerning the individual.

d) A parole progress report.

e) Any medical or psychiatric reports available to the Board.

f) Any relevant material submitted by the prospective parolee.

3. The Board may consider any other information in the file or submitted in support or opposition to parole by other persons.

4. Oral arguments in favor of or in opposition to parole will not be heard by the panel in conference.

V. BASIS FOR DENYING PAROLE

In accordance with statute, the Board shall not parole a candidate if it determines that:

A. There is a substantial risk that the candidate will not conform to reasonable conditions of parole based on one or more of the following factors:

1. Existence of prior adult felony convictions (mitigating as well as aggravating factors to be considered).
2. An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
3. Prior adult parole or probation violations within five years prior to the present offense.
4. Refusal to be supervised on parole.
5. No means of financial support or no place of residence. (Continuance not to exceed six months to seek resolution of problem.)
6. A psychiatric examination determines the candidate is not likely to conform.

B. Release of the candidate would deprecate the seriousness of the offense or promote disrespect for the law, based on one or more of the following factors:

1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy.
2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-5-3.2, Illinois Revised Statutes.

C. Release would have a substantially adverse effect on institutional discipline based on one or more of the following factors as established by the finding of an Administrative Review Board.

1. Physical attack on another inmate or institutional staff.
2. Possession of weapons or drugs.

3. Repeated violation of major institutional rules.

4. Violation of any act prohibited by law.

VI. ORDER OF PAROLE

If the members of the Board in conference determine that the parole should be allowed, they will enter an order for parole, setting the date of release to parole, allowing good time credits to apply. The order of a panel shall be the order of the Board and shall be delivered to the inmate within seven (7) days of its entry.

ORIGINAL

RECEIVED
OCT 21 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82-480

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

RECEIVED
OCT 21 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH P. MCCOMBS,

Petitioner,

vs.

WILLIAM SCOTT,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gary H. Palm
James E. Brown, Senior Law Student
Ruth Krugly, Senior Law Student
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181
Counsel for Respondent, William Scott

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
CERTIORARI SHOULD NOT BE GRANTED	1
I. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE IN THIS CASE HAS ALREADY BEEN RESOLVED BY THIS COURT, AND THE SEVENTH CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS	1
II. THIS CASE IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S GRANTING CERTIORARI BECAUSE THIS IS AN AREA WHICH THIS COURT HAS LEFT TO THE LOWER COURTS TO DEVELOP ON A CASE-BY-CASE BASIS CONSISTENT WITH THIS COURT'S DECISIONS	7
III. THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE ILLINOIS PAROLE STATUTE IS NOT IN CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS	9
IV. THE PROCEDURAL HISTORY OF THIS CASE DOES NOT REQUIRE THIS COURT TO INVOKE ITS SUPERVISORY POWERS	12
CONCLUSION	16
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	Page
Arnett v. Kennedy, 416 U.S. 134 (1974)	6
Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980)	8, 11
Board of Regents v. Roth, 408 U.S. 564 (1972)	5
Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979)	11
Bowles v. Tenant, 613 F.2d 776 (9th Cir. 1980)	10
Burns v. Irving, No. 80-1429 (7th Cir. Dec. 19, 1981)	13
Candelaria v. Griffin, 641 F.2d 868 (10th Cir. 1981)	10
Christopher v. United States Board of Parole, 589 F.2d 924 (7th Cir. 1978)	14
Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981)	4,6,7,9
Evans v. Dillahunty, 662 F.2d 522 (8th Cir. 1981)	9,10
Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)	passim
Harris v. Irving, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980)	6
Jago v. Van Curen, 102 S.Ct. 31 (1981)	7
Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982)	5
Newbury v. Irving, No. 80-2352 (7th Cir. July 23, 1981)	13,15
People v. Hawkins, 54 Ill. 2d 247, 296 N.E.2d 725 (1973)	6
Perry v. Sindermann, 408 U.S. 593 (1972)	5
Schuemann v. Colorado State Bd of Adult Parole, 624 F.2d 172 (10th Cir. 1980)	10
Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979)	11
Slocum v. Georgia State Bd. of Pardons and Paroles, 678 F.2d 940 (11th Cir. 1982)	10
Solomon v. Elsea, 676 F.2d 282 (7th Cir. 1982)	8,10

Stanton v. Wainwright, 665 F.2d 688 (5th Cir. 1981)..... 10

United States of America ex rel. Parisie v. Irving, No. 80-1240 (7th Cir. July 8, 1980), cert. denied, 449 U.S. 863 (1980)..... 13,14

United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976)..... 13,14

United States of America ex rel. Scott v. Illinois Parole and Pardon Bd., 669 F.3d 1185 (7th Cir. 1982)..... passim

Vitek v. Jones, 445 U.S. 480 (1980)..... 4,5,6,9

Wagner v. Gilligan, 609 F.2d 866 (6th Cir. 1979).. 11

Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982)..... 14,15

Williams v. Briscoe, 641 F.2d 274 (5th Cir. 1981), cert. denied, 102 S.Ct. 299 (1981)..... 10

Williams v. Missouri Bd of Education and Parole, 661 F.2d 697 (8th Cir. 1981), cert. denied, 102 S.Ct. 1621 (1982)..... 9

Wolff v. McDonnell, 418 U.S. 539 (1974)..... 5

STATUTES

Ill. Rev. Stat. ch. 38, §1003-3-2.1 (1981)..... 8

Ill. Rev. Stat. ch. 38, §1003-3-5 (1979)..... passim

18 U.S.C. §4206 (1976)..... 8,10

OTHER AUTHORITIES

Ill. Ann. Stat. ch. 38, §1003-3-5 (Smith-Hurd 1973) Council Commentary..... 1

Seventh Cir. R. 35(b)(iv)..... 13,14

State of Illinois Prisoner Review Board, Rules Governing Parole (1979)..... 2,3

CERTIORARI SHOULD NOT BE GRANTED

I. CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE IN THIS CASE HAS ALREADY BEEN RESOLVED BY THIS COURT, AND THE SEVENTH CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH THIS COURT'S DECISIONS.

Since this Court has already decided in what circumstances prisoners have state-created liberty interests protected by due process, certiorari should be denied in this case. In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), Chief Justice Burger, speaking for the Court, held that each state statute authorizing parole must be analyzed in order to determine whether a prisoner has a legitimate expectation of release and therefore has a liberty interest protected by due process. The Court also indicated that each parole system must be analyzed on a "case-by-case basis" in accordance with the principles announced in Greenholtz. Id. at 12. The Seventh Circuit correctly examined the Illinois statutory scheme under the Greenholtz standard and determined that there was a legitimate expectation of release if Illinois prisoners met the conditions for parole. Unites States of America ex rel. Scott v. Illinois Parole and Pardon Board, 669 F.2d 1185 (7th Cir. 1982).

The Seventh Circuit looked at the language of Ill. Rev. Stat. ch. 38, §1003-3-5 (1979) and concluded that it was "practically a mirror image" of the statute construed in Greenholtz. 669 F.2d at 1188. Because the language was not identical to that used in the Nebraska statute construed in Greenholtz, the Seventh Circuit turned to the legislative history of §1003-3-5, as embodied in the

Council Commentary to the statute. The Council Commentary states:

> The Board should state one or more of the reasons listed in subparagraph (c) as the basis for its decision denying parole as required by subparagraph (f). Additional reasons may also be stated.

Ill. Ann. Stat. ch. 38, §1003-3-5 (Smith-Hurd 1971) Council Commentary at 87-88. The Seventh Circuit concluded that this source showed that in the absence of a finding of any of the reasons set out in §1003-3-5(c), the prisoner must be released. The Seventh Circuit reinforced its reading of the statutory language and legislative history of §1003-3-5 by also considering the manner in which the agency charged with enforcing the statute, the Illinois Prisoner Review Board, implements the statute through its rules. The rules referred to by the Seventh Circuit were Rules V and VII of the Rules Governing Parole, issued by the Illinois Prisoner Review Board. Rule V sets out the statutory criteria for release and provides interpretative guidance for the Prisoner Review Board.[1/]

[1/] Rule V states:

In accordance with statute, the Board shall not parole a candidate if it determines that:

A. There is a substantial risk that the candidate will not conform to reasonable conditions of parole based on one or more of the following factors:

1. Existence of prior adult felony convictions (mitigating as well as aggravating factors to be considered).

2. An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).

3. Prior adult parole or probation violations within five years prior to the present offense.

Footnote continued on page 3

Rule VII makes clear that the prisoner is entitled to release on parole unless one of the statutory reasons is found to exist. Rule VII states:

> The order [of denial] shall contain the reason or reasons for denial based on No. V above and a concise statement of facts supporting the reason or reasons given.

1/Footnote continued

4. Refusal to be supervised on parole.

5. No means of financial support or no place of residence. (Continuance not to exceed six months to seek resolution of problem.)

6. A psychiatric examination determines the candidate is not likely to conform.

B. Release of the candidate would deprecate the seriousness of the offense or promote disrespect for the law, based on one or more of the following factors:

1. The offense is one of murder, attempted murder or killing of an individual, robbery with a weapon, rape, indecent liberties, deviate sexual assault, aggravated kidnapping or kidnapping for ransom, armed violence, treason, aggravated arson, treason or calculated criminal drug conspiracy.

2. The aggravating as well as mitigating circumstances as described in Chapter 38, Sections 1005-5-3.1 and 1005-3-3.2, Illinois Revised Statutes.

C. Release would have a substantially adverse effect on institutional discipline based on one or more of the following factors as established by the finding of an Administrative Review Board.

1. Physical attack on another inmate or institutional staff.

2. Possession of weapons or drugs.

3. Repeated violation of major institutional rules.

4. Violation of any act prohibited by law.

State of Illinois Prisoner Review Board, Rules Governing Parole 6 (1979).

State of Illinois Prisoner Review Board, Rules Governing Parole 7 (1979) (emphasis added). The Seventh Circuit correctly relied on Rule VII in concluding that the Illinois parole statute mandates parole unless one of the reasons in Rule V is found.

In addition to providing an aid in the statutory construction of §1003-3-5, the rules promulgated by the Illinois Prisoner Review Board have independent significance in the determination of whether due process attaches to the Illinois parole system. As this Court stated in Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), a court must look to the "statutes or other rules defining the obligations" when deciding whether a protected entitlement is created. Id. at 465 (emphasis added). As demonstrated above, the rules of the Prisoner Review Board show that a prisoner must be released unless one of the defined criteria in Rule V is established. Under Dumschat, then, the statute and the rules together have created an entitlement to parole which is protected by due process.

The Seventh Circuit's decision in this case is also consistent with Vitek v. Jones, 445 U.S. 480 (1980). In determining that a prisoner had a liberty interest not to be transferred from a prison to a mental institution, this Court examined both the statutory language and the actual practices under the statute. This Court found that prisoners could reasonably expect that they would not be transferred to a mental hospital unless one of the reasons listed in the statute was met. Likewise, in this case there was a reasonable expectation of parole under Ill. Rev. Stat. ch. 38, §1003-3-5 (1979) because the practice

in Illinois was that the parole board would only deny parole if one of the reasons listed in the statute was found. Indeed, when the Illinois Prisoner Review Board denies parole it uses a form which contains check-off boxes for each reason listed in the statute. This form forces the parole board to choose one of the reasons for denial set out in the statute. See Appendix A. The Seventh Circuit's result is consistent with the Prisoner Review Board's practice.

The above precedents are but a part of this Court's more general analysis in the area of due process. This Court's decisions hold that when a state creates a statutory benefit which may be forfeited only for "cause shown", due process protections arise. See e.g., Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982); Wolff v. McDonnell, 418 U.S. 539 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). These procedural due process requirements are a matter of federal law, and do not depend on what procedure the state may deem adequate. See Vitek v. Jones, 445 U.S. 480, 491 (1980) ("These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action"). This is because "any other conclusion would allow the State to destroy at will virtually any state-created ... interest." Logan v. Zimmerman Brush Co., 102 S.Ct. at 1156 (property interest).

This Court's modern analysis of due process undercuts the State's attempt to invoke principles of federalism

or comity between state and federal courts. The question of whether the Illinois statute is constructed in such a way as to cause due process to attach is a federal one. State precedent is only useful to the extent that it examines the question in light of federal standards such as those set out in Greenholtz, Dumschat, and Vitek. See Vitek v. Jones, 445 U.S. 480, 491, (1980); Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion). Moreover, even if state precedent were to control the issue of whether the Illinois parole release statute creates an entitlement subject to due process protection, the State has failed to cite a single Illinois case which decides this issue in its favor. While there are a number of Illinois decisions which state that parole is a matter of "grace and clemency," no Illinois case has ever decided the specific issue in this case--whether the Illinois parole release statute creates an entitlement which is protected by the Due Process Clause. The State cites two cases, People v. Hawkins, 54 Ill.2d 247, 296 N.E.2d 725 (1973) and Harris v. Irving, 90 Ill.App.3d 56, 412 N.E.2d 976 (5th Dist. 1980), as authority for the proposition that §1003-3-5 does not create a protected liberty interest. Hawkins involved the question of what type of material may be contained in statements made by the prosecutor and trial court to the parole board. This case was a pre-Greenholtz decision which did not even consider whether the Illinois parole system created a protected liberty interest. The Illinois Appellate Court addressed in Harris the issue of due process in the parole context in dicta. However, the court merely noted that under Greenholtz a prisoner has no constitutional right to parole.

The court did not consider the issue here--whether the Illinois parole system created an expectation of parole in light of Greenholtz standards. Therefore, the Seventh Circuit properly distinguished the Illinois decisions from an analytical, as well as factual, standpoint.

The Seventh Circuit's decision in this case is not inconsistent with this Court's decisions in Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981) and Jago v. Van Curen, 102 S.Ct. 31 (1981). In Dumschat this Court rejected a claim of entitlement based solely on statistical evidence of past decisions of the pardon board. In Jago this Court rejected a claim based on the "mutually explicit understandings" between the prisoner and the parole authorities. Here the Seventh Circuit relied neither on statistical evidence nor on mutually explicit understandings but rather on the statute, rules, and procedures used by the Illinois Prisoner Review Board.

II. THIS CASE IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S GRANTING CERTIORARI BECAUSE THIS IS AN AREA WHICH THIS COURT HAS LEFT TO THE LOWER COURTS TO DEVELOP ON A CASE-BY-CASE BASIS CONSISTENT WITH THIS COURT'S DECISIONS.

This case is not sufficiently important to justify review by this Court. The Seventh Circuit's decision in this case, that the Illinois parole release statute requires that the Illinois Prisoner Review Board give more than boilerplate reasons when denying parole, does not burden the decision-making process of the Board in its handling of a diminishing pool of parole applicants. The Seventh Circuit's decision merely requires the Board to articulate its reasons for denying parole. Further, Illinois prisoners

sentenced since February 1, 1978 are not subject to the parole process, but instead are under a determinate sentencing system which does not provide for parole. Ill. Rev. Stat. ch. 38 §1003-3-2.1 (1981). Thus this decision only affects a diminishing number of Illinois prisoners.

Chief Justice Burger, in Greenholtz, indicated that the question of whether due process attaches to parole was one best suited for development on a "case-by-case basis." 442 U.S. at 12. This is precisely the analytical process used by the Seventh Circuit in this case. As indicated in the preceding section of this brief, the Seventh Circuit looked to the language of the Illinois statute, the Council Commentary to the statute, and the Rules of the Illinois Prisoner Review Board. This examination led the court to conclude that under the Illinois parole system an inmate who is eligible for parole can expect to be paroled unless one of the specified reasons for denial is found.

It is difficult to imagine a more careful attempt to adhere to the case-by-case analysis mandated by Greenholtz. In Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980), for example, Judge Sprecher writing for the Seventh Circuit, used the same analysis as that used here, but reached the conclusion that the Indiana parole release statute did not create a protected liberty interest. On the other hand, the Seventh Circuit recently construed the United State parole release statute, 18 U.S.C. §4206 (1976), and the United States Parole Commission's Guidelines and found that they did create a protected liberty interest. Solomon v. Elsea, 676 F.2d 282 (7th Cir. 1982). This diversity of results is to be expected under a standard which examines

the structure of each parole system and the practices used to implement that system. Unless this Court wishes to become involved in every case which applies the principles of Greenholtz, Vitek, and Dumschat, it should deny certiorari in this case.

III. THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE ILLINOIS PAROLE STATUTE IS NOT IN CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS.

The Seventh Circuit properly analyzed the Illinois parole system and its decision is not in conflict with the decisions of other circuits. As one court noted, "[t]he question in each case must turn on a careful examination of the particular statutes and regulations governing parole in a given jurisdiction." Evans v. Dillahunty, 662 F.2d 522, 524 (8th Cir. 1981). Although a direct comparison is therefore difficult, the decisions handed down by other circuits are consistent with the Seventh Circuit's interpretation of Illinois law.

In one case, for instance, the Eighth Circuit found that Missouri inmates have a "protected liberty interest, rooted in state law, in parole release." Williams v. Missouri Bd. of Education and Parole, 661 F.2d 697, 698 (8th Cir. 1981), cert. denied, 102 S.Ct. 1621 (1982). Applying the Greenholtz test, the court stated:

> [W]e conclude that the Missouri law providing that when the statutory and regulatory guidelines are met the inmate shall be released on parole gives rise to the same protectible entitlement as the Nebraska scheme providing that the prisoner shall be paroled unless certain findings are made. Id. at 699 (emphasis in original).

The Eighth Circuit's analysis points up the fact, ignored by the State of Illinois in its petition for a writ of

certiorari in this case, that no magic combination of words is needed to create a constitutionally protected liberty interest. The "shall/unless" language of the Nebraska statute is one way to create such an interest. The "when/shall" language of the Missouri statute is another. The "shall not/if" language of the Illinois statute exemplifies a third articulation of a liberty interest. The question in all of these cases is whether, and to what extent, the authority of the parole board is circumscribed; the question is not what specific words are used to define that authority.

A similar analysis has been employed in the federal context. In Evans v. Dillahunty, 662 F.2d 522 (1981), the Eighth Circuit decided that the federal parole statute, 18 U.S.C. §4206(a), created a constitutionally protected expectation of liberty. See also Solomon v. Elsea, 676 F.2d 282 (7th Cir. 1982) (holding that under the federal parole statute, an inmate has an expectation of parole worthy of due process protection), and Bowles v. Tenant, 613 F.2d 776 (9th Cir. 1980) (holding that the language of the federal statute would create a liberty interest under Greenholtz).

The State cites several cases in an attempt to establish the proposition that only "shall/unless" language creates a protected liberty interest. See Petitioner's Brief at 11-12, citing Slocum v. Georgia State Bd. of Pardons and Paroles, 678 F.2d 940 (11th Cir. 1982); Stanton v. Wainwright, 665 F.2d 688 (5th Cir. 1981); Williams v. Briscoe, 641 F.2d 274 (5th Cir. 1981), cert. denied, 102 S.Ct. 299 (1981); Candelaria v. Griffin, 641 F.2d 868 (10th Cir. 1981); Schuemann v. Colorado State Bd. of Adult Parole, 624 F.2d 172

(10th Cir. 1980); Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980); Wagner v. Gilligan, 609 F.2d 866 (6th Cir. 1979) and Shirley v. Chestnut, 603 F.2d 805 (10th Cir. 1979). These decisions, however, are easily distinguishable from the case at bar in at least two major respects. First, the state parole statutes considered in these cases accorded the parole boards unlimited discretion in deciding whether to grant parole. Therefore, those statutes were distinctly different from the Illinois statute since virtually no constraints were placed on the parole boards' authority. Second, the decisions cited by the State did not discuss the rules, regulations, or practices which would help to construe the statute and determine whether it created a reasonable expectancy of release on parole. This is in contradistinction to the Seventh Circuit's opinion, which relied on the Council Commentary to the parole statute and the Board's Rules Governing Parole in determining that the Illinois Parole statute creates an expectancy of parole protected by due process. Scott, 669 F.2d at 1189-90. In only one case cited by the State, Boothe v. Hammock, 605 F.2d 661 (2d Cir. 1979), did the court look at anything beyond the statutory language. There, the Second Circuit properly considered the New York Parole Board's Guidelines as well as the New York Parole statute. The court determined that the Guidelines were not intended to limit the Parole Board's discretion, but were merely meant to aid the Board in its decision-making process.

The Scott court correctly recognized that "in none of these cases was the language of the statute considered by the court the same or even similar to that contained

in the statute now before us." Scott, 669 F.2d at 1188. The lesson of Greenholtz is that each statute must be carefully analyzed to determine whether a constitutional liberty interest is created. Such an inquiry should follow normal rules of statutory construction, including consideration of legislative history and interpretations by the agency responsible for administering the statute. The Seventh Circuit's inquiry was proper and should not be disturbed by this Court.

IV. THE PROCEDURAL HISTORY OF THIS CASE DOES NOT REQUIRE THIS COURT TO INVOKE ITS SUPERVISORY POWERS.

The State of Illinois characterizes the Seventh Circuit's role in this case as one of an advocate, claiming that the State was denied an opportunity to present its position on the merits of the issue in this case. Petition at 23. In actuality any such denial was due to the State's own failure to take this case seriously. Now the State claims that its failure was "adequate and reasonable", as it had "no reason to suspect" that the Seventh Circuit would reach the issues it did. Id. at 29.

One problem with this position is that the State was given the same opportunity to brief this case as any other litigant in the Seventh Circuit Court of Appeals. The issues were raised by Mr. Scott in his brief. The State should not now be allowed to complain about its failure to file sufficient briefs in the Seventh Circuit. It had

the opportunity to file briefs and did not take advantage of it.[2/]

The State of Illinois claims that it was reasonably lulled into its belief that due process does not attach to parole in Illinois by certain unpublished orders of the Seventh Circuit Court of Appeals and the District Courts in Illinois. The State conveniently overlooks two facts: 1) the Seventh Circuit's Rules explicitly state that its unpublished decisions are not to be relied on as precedent, Seventh Cir. R. 35(b)(iv), and 2) the controlling Seventh Circuit opinion concerning the Illinois parole system specifically held that due process attaches to parole in Illinois. United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976).

The state relies on the unpublished orders in Burns v. Irving, No. 80-1429 (7th Cir. Dec. 8, 1981) and United States of America ex rel. Parisie v. Irving, No. 80-1240 (July 8, 1980), cert. denied, 449 U.S. 863 (1980) as support for its claim that it was "adequate and reasonable" merely

---

[2/] Actually, the State had at least two opportunities that Respondent's attorney knows about to brief the issue of whether due process attaches to parole in Illinois. In Newbury v. Irving, No. 80-2352 (7th Cir. July 23, 1981) the Seventh Circuit Court of Appeals appointed this attorney, Gary H. Palm, to represent Mr. Newbury and specifically instructed him to brief the issue of "whether the district court erred in concluding that Ill. Rev. Stat. ch. 38, §1003-3-5 (1978 supp.) did not create a constitutionally protected liberty interest." After the Appellant's brief was filed, the Office of the Attorney General of the State of Illinois indicated that it would not file a brief because no state official had yet been served with the complaint. No summons was served because leave to proceed in forma pauperis had been denied and the complaint had been dismissed by the district court. Thereafter the Seventh Circuit reversed the denial of in forma pauperis status and concluded that the district court had decided "too hastily" that the Illinois parole statute provided no due process protections. The case was remanded to consider this issue in more detail.

to "summarily highlight[]" the issue in its brief to the Seventh Circuit. Petition at 29 and 27. The State's reliance on these unpublished orders is completely misplaced. The State appears to argue that these unpublished orders implicitly overruled Richerson. In so doing, it overlooks the fact that these orders cannot be cited as precedent and cannot overrule a published decision. The rules of the Seventh Circuit explicitly state that unpublished orders, "[e]xcept to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent (a) in any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose."[3/] Seventh Cir. R. 35(b)(iv).

The published opinions, however, are consistent in ruling that the Illinois parole statute creates a protected liberty interest requiring due process guarantees. The case of United States ex rel. Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914 (1976) was the first case to establish this. Richerson was reaffirmed in Christopher v. United States Board of Parole, 589 F.2d 924 (7th Cir. 1978), where the court expressly declined to reconsider Richerson. While both of these cases were decided before Greenholtz, neither has been overruled by the Seventh Circuit.

This consistency has continued in the recent case of Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982). Contrary

---

[3/] In addition, the State has not fairly characterised the order in Parisie. The Seventh Circuit never reached the question of whether the Illinois parole system creates a liberty interest in that case. Instead the court merely dismissed the appeal for failure to pay the docketing fee.

to the State's assertion that the decision in Welsh is inconsistent with the decision in this case, the decisions are instead complementary. Welsh specifically held that "[i]f the [Illinois Prisoner Review] Board denies parole yet again, it must--as the state acknowledges (Br. 6)--give its reasons in order to satisfy the due process requirements of Greenholtz." 668 F.2d at 333. If Welsh had not found a protected liberty interest in the Illinois parole system, it would not have required that the Greenholtz requirements be met. However, contrary to the position taken by the State, the law in the Seventh Circuit has consistently been that due process attaches to parole in Illinois.

Furthermore, the State acknowledges its awareness of the unpublished Seventh Circuit order in Newbury v. Irving, No. 80-2352 (7th Cir. July 23, 1981). In Newbury, the court concluded that the district court had "proceeded too hastily" in coming to the conclusion "that the Illinois statutes governing parole did not create a liberty interest within the meaning of the Constitution." If the state truly believed that unpublished opinions indicate the trend of the court, it is somewhat surprising that the decision in Newbury did not alert the state that its reading of the mood of the court might be incorrect.

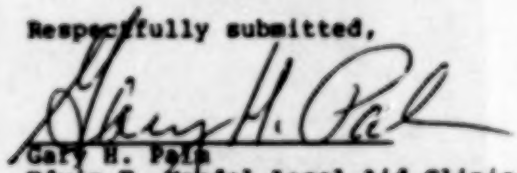
The State of Illinois has had at least two opportunities to brief the issues presented in this case. In both instances the Attorney General decided not to give his best effort and file a brief setting out his complete argument. He should not now be allowed to benefit from his earlier lack of effort. The Seventh Circuit Court of Appeals never refused to let the Attorney General file any brief in this

case. Rather it was the Attorney General who chose not to prepare and file his best brief. Certiorari should not be granted for the purpose of ordering the Seventh Circuit to allow the Attorney General yet another opportunity to file a brief on this issue.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,



Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181
Attorney for Respondent,
William Scott

APPENDIX A

STATE OF ILLINOIS
PRISONER REVIEW BOARD

Date: _____

To the Warden—
The following order is your authority to release this individual on parole to the custody and supervision of the Office of Community Supervision, or continue to hold as indicated. If parole is ordered, said order is subject to being vacated prior to release on parole. Any release is contingent upon execution of Parole or Mandatory Supervised Release Agreement.

☐ Parole granted effective when

- ☐ Parole plans are approved
- ☐ Minimum is served
- ☐ Eligible

☐ Subject to regular conditions and

- ☐ Close Supervision
- ☐ Special Condition No. _____
- ☐ Recommendation No. _____

☐ Parole denied, continued to _____

☐ Hearing continued to ___To Base_____

- ☐ Psychiatric Report requested
- ☐ For verification of parole plans
- ☐ At inmate's request

☐ Release date after addended to this Order

☐ Declared a violator as of _____ on

- ☐ Statutory Parole
- ☐ Mandatory Supervised Release
- ☐ Parole

☐ Parole or release revoked

- ☐ Continued to _____

☐ Parole or release continued

- ☐ Effective _____
- ☐ Effective when plans are approved

☐ Found not to be a violator

☐ Hearing continued to _____

- ☐ For further information
- ☐ At inmate's request
- ☐ For Violation Report
- ☐ Recommendation No. _____
- ☐ Special Condition No. _____

☐ Order of _____

- ☐ Amended
- ☐ Stayed
- ☐ Vacated

☐ Warrant withheld
☐ Warrant withdrawal request

- ☐ Granted
- ☐ Denied

☐ Statutory Parole

☐ Release by statute

☐ Considering all factors of your case, it is the judgment of the Board that parole is warranted.

☐ See Addendum attached to and made a part of this Order

The Board, considering all factors in your case, is denying parole at this time because of one or more of the following statutory reasons:

☐ There is a substantial risk that you will not conform to the reasonable conditions of parole, based upon one or more of the following reasons:

- ☐ Existence of prior adult felony convictions.
- ☐ An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
- ☐ Prior adult parole or probation violations within five years prior to offense.
- ☐ Refusal to be supervised on parole.
- ☐ Inadequate parole plan.

☐ Your release would depreciate the seriousness of the offense or promote disrespect for the law, based upon one or more of the following factors:

- ☐ The offense for which you were convicted, _____
- ☐ The aggravating as well as mitigating circumstances as described by statute.

☐ Your release would have a substantially adverse effect on institutional discipline based upon one or more of the following factors as established by the finding of an Administrative Review Board:

- ☐ Physical attack on another inmate or institutional staff.
- ☐ Possession of weapons or drugs.
- ☐ Repeated violations of major institutional rules.
- ☐ Committed an act prohibited by law.

Violator Rationale

Parole or release is violated because you:

☐ Were convicted of (charged with) _____
☐ Violated condition(s) _____ of your Parole or Release Agreement
☐ Violated condition(s) _____ of your Special Order
☐ Absconded
☐ Possessed ☐ Delivered
- ☐ A controlled substance
- ☐ A weapon

☐ Did not comply with your counselor's instructions to _____
☐ Failed to report or falsified report(s)

Evidence Relied Upon

- ☐ Counselor's Report
- ☐ Police Report
- ☐ Testimony or reports of witnesses
- ☐ Own admission

☐ See Addendum attached to and made a part of this Order

For The Board

[signature]

[signature]

[signature]

White: Board
Canary: Inst. File
Pink: Resident
Goldenrod: Clinical or Parole Services

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

NO. 82-480

JOSEPH P. MCCOMBS,

Petitioner,

v.

WILLIAM SCOTT,

Respondent.

RECEIVED
OCT 21 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NOTICE OF FILING

TO: Tyrone C. Fahner
Attorney General
Michael B. Weinstein
Darrell Panethiere
188 West Randolph Street
Suite 2200
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on the 18th day of October, 1982, the undersigned filed with the Clerk of the United States Supreme Court, one copy of the Respondent's Motion for Leave to Proceed In Forma Pauperis, Supporting Affidavit, and Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The undersigned, a member of the Bar of the United States Supreme Court, being first duly sworn on oath, deposes and states that said filing was properly addressed to the Clerk of the United States Supreme Court, carried out by depositing same in a United States mailbox at 1111 East 60th Street, Chicago, Illinois 60637, with first-class postage prepaid, before the hour of 5:00 p.m. on the 18th day of October.

Gary H. Palm
Counsel for Respondent,
William Scott

Subscribed to and Sworn
before me this the 18th
day of October, 1982.

Notary Public

PROOF OF SERVICE

The undersigned, an attorney, being first duly sworn on oath, deposes and states that he served the foregoing Notice of Filing, together with one copy of the attached Motion for Leave to File In Forma Pauperis, Supporting Affidavit, and Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit upon the above named by placing a copy of same in envelopes addressed as above and depositing said envelopes in the United States Mailbox located at 1111 East 60th Street, Chicago, Illinois 60637, first class postage prepaid, before the hour of 5:00 p.m. on the 18th day of October, 1982.

Gary H. Palm
Counsel for Respondent,
William Scott

Subscribed to and Sworn
before me this the 18th
day of October, 1982.

Notary Public

RECEIVED
OCT 21 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181

FJ1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RECEIVED
OCT 21 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82-480

JOSEPH P. MCCOMBS, Petitioner

v.

WILLIAM SCOTT, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, William Scott, asks leave to proceed in forma pauperis pursuant to Rule 46. In forma pauperis status was sought and granted in both the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit below.

The respondent's affidavit in support of this motion is attached hereto.

Gary H. Palm
Counsel for Respondent

Gary H. Palm
James E. Brown, Senior Law Student
Ruth Krugly, Senior Law Student
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181
Counsel for Respondent, William Scott

1/

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-480

JOSEPH P. MCCOMBS, Petitioner

v.

WILLIAM SCOTT, Respondent

RECEIVED
OCT 21 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, William Scott, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore.

I further swear that the responses which I have made to the questions and instructions below are true.

1. Are you presently employed?

No.

If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

June, 1967. Around $700 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

William Scott

Subscribed and Sworn to
before me this the
13 day of October, 1982.

Cheryl Hickey
Notary Public

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-480

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH P. McCOMBS, Chairman,
Illinois Prisoner Review Board,

Petitioner,

vs.

WILLIAM SCOTT,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TYRONE C. FAHNER
Attorney General, State of Illinois
MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Petitioner

MARCIA FRIEDL
TERENCE M. MADSEN
Assistant Attorneys General
Of Counsel

Printed by Authority of the State of Illinois (P.O. 31216—55—10-29-82)

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines to find a legitimate expectation of release on parole where the Illinois parole statute contains no mandatory language limiting the Illinois Prisoner Review Board's broad discretion to deny parole and where Illinois courts have squarely held that parole under the statute is a matter of executive grace and clemency.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT:	
I.	
A *De Minimis* Approach To This Petition Is Particularly Inappropriate In View Of The Respondent's Inability To Offer Any Federal Case Law Supporting A Finding Of An Expectation Of Parole Release In A Statute Which Is Found To Be Amenable To A Reading That Does Not Create An Expectation Of Release And Which Has Never Been Seen As Creating An Expectation Of Release By The State Courts Charged With Interpreting It Or The Administrative Agency Charged With Enforcing It	2
II.	
The Procedural History Of This Case More Than Justifies This Court's Exercise Of Its Supervisory Powers To Correct This Costly And Unjust Decision	6
CONCLUSION	10
APPENDIX O: Parole denial notice of William Heirens	1a

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Burns v. Irving, No. 80-1429 (7th Cir. 1981)	7
George v. The People, 169 Ill. 447 (1897)	3
Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)	*passim*
Newbury v. Irving, No. 80-2352 (7th Cir. July 23, 1981)	6, 7
People ex rel. Burbank v. Irving, 108 Ill. App. 3d 697, 439 N.E.2d 554 (3rd Dist. 1982)	4
People ex rel. Harris v. Irving, 90 Ill. App. 3d 56, 412 N.E.2d 976 (5th Dist. 1980)	4
People v. Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964)	3
United States of America ex rel. Parisie v. Irving, No. 80-1240, (7th Cir. July 8, 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 168 (1980)	7
Welsh v. Mizell, 668 F.2d 328 (7th Cir. 1982), *cert. denied*, No. 81-2105 (October 12, 1982)	5

STATUTES:	
28 U.S.C. §2254	7, 8
Ill. Rev. Stat., 1969, ch. 108 §203	5
Ill. Rev. Stat., 1981, ch. 127 §1302	7

MISCELLANEOUS:	
Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit, 1981 ed.	8

In The

Supreme Court of the United States

October Term, 1982

JOSEPH P. McCOMBS, Chairman,
Illinois Prisoner Review Board,

Petitioner,

vs.

WILLIAM SCOTT,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

A *DE MINIMIS* APPROACH TO THIS PETITION IS PARTICULARLY INAPPROPRIATE IN VIEW OF THE RESPONDENT'S INABILITY TO OFFER ANY FEDERAL CASE LAW SUPPORTING A FINDING OF AN EXPECTATION OF PAROLE RELEASE IN A STATUTE WHICH IS FOUND TO BE AMENABLE TO A READING THAT DOES NOT CREATE AN EXPECTATION OF RELEASE AND WHICH HAS NEVER BEEN SEEN AS CREATING AN EXPECTATION OF RELEASE BY THE STATE COURTS CHARGED WITH INTERPRETING IT OR THE ADMINISTRATIVE AGENCY CHARGED WITH ENFORCING IT.

In the Petition for Writ of Certiorari, the petitioner has contended that the United States Court of Appeals for the Seventh Circuit impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines to find a legitimate expectation of release on parole where the Illinois scheme of parole contains nothing which limits the Illinois Prisoner Review Board's broad discretion to deny parole and where Illinois courts have consistently and squarely held that parole under the statute is a matter of executive grace and clemency. The respondent has answered with a *de minimis* argument which addresses neither the conflict with the state courts nor the conflict with the rationale underlying due process analyses consistently relied on by this Court and other circuit courts of appeals.

The response to the Petition for Writ of Certiorari argues that the Seventh Circuit merely determined that there was a legitimate expectation of release under the Illinois parole scheme "if Illinois prisoners met the conditions for parole." Response at 1. The respondent then

contends that this analysis is entirely consistent with this Court's decision in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and its progeny. The respondent avoids attempting to set forth *any* precedent for finding a protected liberty interest in a parole scheme which vests total discretion in denying parole in the, heretofore, unreviewable discretion of the state parole authority. The respondent also fails to point to any provision of Illinois law which mandates that an inmate must be released if some "conditions of parole" are met. To find those "conditions," the respondent resorted to a lengthy analysis of a 1979 set of ever-changing administrative guidelines, but then fails to even suggest that the guidelines have some binding effect on the day-to-day decisions of the board.

The Illinois General Assembly created a parole authority in the mid-nineteenth century and gave that parole authority full discretion in the decision to grant or deny parole. *See George v. The People*, 169 Ill. 447 (1897). From time-to-time the General Assembly has modified the procedures and factors for consideration in reaching the parole decision. *See People v. Kinney*, 30 Ill.2d 201, 195 N.E.2d 651 (1964). In 1972, largely because of concerns over the federal courts' meddling in what the General Assembly considered to be a state legislative realm, the parole statute was changed to limit the parole authority's ability to *grant* parole under certain circumstances. Petition for Writ of Certiorari at 18-20.

Contrary to the respondent's position, logic dictates that limiting the ability to grant parole while leaving intact unbridled discretion to deny parole *decreases* the potential for a reasonable expectation of release.

At least two of the five Illinois Appellate Court districts have looked at the Illinois parole scheme and

relied on *Greenholtz* to determine that no expectation of release on parole exists in Illinois. *See People ex rel. Harris v. Irving*, 90 Ill. App. 3d 56, 60, 412 N.E.2d 976 (5th Dist. 1980); *People ex rel. Burbank v. Irving*, 108 Ill. App. 3d 697, 702, 439 N.E.2d 554 (3rd Dist. 1982). In *Burbank*, the Court noted that, "In Illinois, the mere existence of a system for paroling prisoners does not transform parole into a legal right [citing to *Greenholtz*] . . . . The decision to modify the prisoner's status lies within the largely unreviewable discretion of the Prisoner Review Board." *People ex rel. Burbank v. Irving*, 108 Ill. App. 3d at 702, 439 N.E.2d at 557.

The decision in *Burbank*, entered several months after the Seventh Circuit published the opinion in *Scott*, once again clearly reaffirms the Illinois courts' view that the Illinois scheme of parole does not create an expectation of release on parole and leaves the federal courts in Illinois as the only forums which apparently recognize these two thousand inmates' claims regarding parole denial.

The respondent's only attempt to distinguish ninety years of Illinois caselaw is by asserting that no Illinois court has ever said that it considered the rules and regulations of the parole authority. The petitioner answers this claim with the observation that the Seventh Circuit also failed to fully consider the "rules and regulations." The petitioner respectfully suggests that rules of an administrative agency can not be considered in a vacuum.

To this day, the parties have no idea which edition of the Rules Governing Parole was relied on by the Seventh Circuit. Moreover, the court of appeals made no inquiry into the finality or authority of the rules in the eyes of the Board or the frequency or effect of changes in those rules. Clearly, if the Board believed the rules relied on so heavily by the respondent and the Seventh

Circuit to be anything more than a guide then how does the respondent explain parole denials for being "an habitual offender." (*See Appendix M, Petition for Writ of Certiorari*)[1]

Finally, the respondent's citation to *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982), *cert. denied*, No. 81-2105 (October 12, 1982), for the proposition that due process rights existed prior to 1973 when analyzed in light of *Greenholtz* is particularly misguided. The citation to *Greenholtz* in *Welsh* refers to an admission by the State on a question that was not in issue. Clearly, the pre-1973 Illinois statute, which contains none of the language relied on in *Scott*, creates no expectation of release on parole. *See Ill. Rev. Stat.*, 1969, ch. 108, § 203 *et seq.*

Welsh is important, on the other hand, because the court's consideration of the constitutionality of the 1973 parole statute in relation to its application to an inmate convicted of a 1969 offense in *Scott* is wholly irreconcilable with *Welsh* and unexplainable in view of *Welsh*. The petitioner notes that the respondent did not even hazard any attempt at an explanation for this conflict in his response.

The decision of the Seventh Circuit in this case directly conflicts with the reasoning underlying *Greenholtz*, an unbroken line of Illinois caselaw, the intent of the Illinois legislature, and the Seventh Circuit's own decision in *Welsh*. This Court should allow the Petition for Writ

---

[1] The respondent's assertion that the Board has used a checklist for denial notices since 1978 is partially correct. This is because the majority of inmates have been found to be affected by these criteria in some way. Nonetheless, where the Board wishes to deny parole for a reason other than those listed it merely checks the box referring the inmate to an addendum and appends an explanation of the reason. *See* attached *Appendix O at 1a.*

of Certiorari and allow the People of the State of Illinois an opportunity to challenge this costly and unjust decision.

II.

THE PROCEDURAL HISTORY OF THIS CASE MORE THAN JUSTIFIES THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS TO CORRECT THIS COSTLY AND UNJUST DECISION.

The most distressingly misleading portion of the response is that directed to the procedural history of this case.

The Seventh Circuit first found due process interests arising from the present form of the Illinois parole statute in *United States of America ex rel. Richerson v. Wolff*, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976). The *Richerson* decision relied on an analysis that found a constitutionally protected interest to be present if the State held out the mere possibility of parole. That analysis was, as the Seventh Circuit noted in this case, "specifically rejected" by this Court in *Greenholtz. United States of America ex rel. Scott v. Illinois Parole and Pardon Bd.*, 669 F.2d 1185 at 1187.

Immediately following the *Greenholtz* decision, the Seventh Circuit and the United States District Courts in Illinois began uniformly denying habeas corpus petitions in light of analyses conducted pursuant to *Greenholtz*. The Seventh Circuit's opinions in this regard were short, plain and consistent. The lone exception to the consistency was the decision in *Newbury v. Irving*, No. 80-2352 (7th Cir. July 23, 1981).

The Illinois Attorney General could not participate in *Newbury* because the action was a proceeding under 42 U.S.C. § 1983 against an individual. In Illinois, the At-

torney General is prohibited by statute from representing individual defendants in such cases until a formal request for representation has been made by the party and then approved. *Ill. Rev. Stat.*, 1981, ch. 127, § 1302. Because *Newbury* was denied leave to proceed in the district court and, therefore, the defendant was not actually made a party to the action, it was not possible for the Attorney General to have represented him.

Moreover, in the *Burns* decision several months after *Newbury*, the court considered an *identical* claim in a 28 U.S.C. § 2254 context and summarily affirmed the district court's *sua sponte* dismissal of the petition as frivolous. *Burns v. Irving*, No. 80-1429 (7th Cir. December 8, 1981). The respondent's argument that *Newbury* somehow "signaled" *Scott* is creative, but frivolous nonetheless, in view of the strong, clear language of *Burns* and the fact that Judge Sprecher was a member of the panel in both cases.[2]

Nonetheless, the respondent stands firm on the incredible argument that unpublished orders of the Seventh Circuit have *no* precedential value whatsoever. The respondent's argument reduces Circuit Rule 35 to the absurd. Circuit Rule 35(c)(1)(i) tells litigants that an opinion *will* be published if it changes an existing rule of law. When the district court dismisses a Section 2254

---

[2] The respondent has also argued, in a footnote, that the petitioner has not fairly characterized the issue in *United States of America ex rel. Parisie v. Irving*, No. 80-1240 (7th Cir. July 8, 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 168 (1980). Contrary to the respondent's unexplainable representation, leave to proceed *in forma pauperis* was denied in *Parisie* because the action was frivolous. Had the district court merely found that the petitioner had sufficient funds to initiate the action, it would have denied leave to proceed *in forma pauperis* on that stated ground and would not have had to consider the potential merit of the claim to deny leave to proceed.

petition for failure to state a constitutional claim on the basis of *Greenholtz* and is affirmed by the Seventh Circuit in an order, which by its very form, tells the parties that the position is consistent with the existing rule of law in the circuit, then the parties to that action *must* have a right to rely on that decision in determining their future course of conduct. Federal courts have no right to impose whimsical decisions on state administrative agencies which are constantly struggling to adjust their conduct to protect the constitutional rights of the people with whom they deal.

The decisions in all of the unpublished pre-*Scott* orders were consistent and straightforward in relying on *Greenholtz* to tell Illinois inmates that they had no protected liberty interest under the Illinois parole scheme.

The sanctimonious suggestion by the respondent, from within the confines of the idealistic environs of the university, that the Illinois Attorney General should "prepare and file his best brief" in every *pro se* appeal from a dismissal of a frivolous Section 2254 claim demonstrates a marked lack of understanding of the realities of the practice of public law.[3] Indeed, the realities of appellate practice itself mandate that counsel not "puff" briefs by arguing settled questions.[4] These realities are

---

[3] In Illinois, fourteen assistant attorneys general are charged with the primary responsibility for *all* criminal cases in the Illinois Supreme Court, *all* Illinois criminal cases in this Court, and *all* federal habeas proceedings on all levels.

[4] The *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit*, 1981 ed., which is distributed by the Clerk of the Seventh Circuit instructs practitioners that

> "The brief writer should never forget that the judges are reading the briefs in six cases in preparation for each day of oral argument. The writer must select what is important and deal only with that; all that is not necessary should be ruthlessly discarded." *Id.*, at 42.

made even bleaker by sweeping decisions, such as this, which stretch the imagination to create more than two thousand federal causes of action which are theoretically capable of annual repetition for several years but which are not cognizable in the state courts.

In view of the procedural history of this case, this Court should grant the Petition for Writ of Certiorari in order to remove the court of appeals from the advocate's role and to allow the People of the State of Illinois to be heard. In the alternative, this Court should defer to the unbroken line of Illinois case law and summarily reverse the Seventh Circuit's opinion which, effectively, destroys the considerations underlying this Court's decision in *Greenholtz*, and which directly conflicts with the unanimous position of the state courts on a question involving the construction of a state statute.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
DARRELL PANETHIERE
Assistant Attorneys General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Counsel for Petitioner

MARCIA FRIEDL
TERENCE M. MADSEN
Assistant Attorneys General
Of Counsel

APPENDIX O

Name: William Heirens
No. C-06103

Inst. Vienna
Dkt. No. _____

STATE OF ILLINOIS
PRISONER REVIEW BOARD

Date Aug. 16, 1982

To the Warden—
The following order is your authority to release this individual on parole to the custody and supervision of the Office of Community Supervision, or continue to hold as indicated. If parole is ordered, said order is subject to being vacated prior to release to parole. Any release is contingent upon execution of Parole or Mandatory Supervised Release Agreement.

- ☐ Parole granted effective when
  - ☐ Parole plans are approved
  - ☐ Minimum is served
  - ☐ Eligible
- ☐ Subject to regular conditions and
  - ☐ Close Supervision
  - ☐ Special Condition No. _____
  - ☐ Recommendation No. _____
- ☒ Parole denied, continued to June 1983
- ☐ Hearing continued to _____
  - ☐ Psychiatric Report requested
  - ☐ For verification of parole plans
  - ☐ At inmate's request
- ☐ Release date offer addended to this Order

_____

☐ Declared a violator as of

_____ on

☐ Statutory Parole
☐ Mandatory Supervised Release
☐ Parole

☐ Parole or release revoked

☐ Continued to _____

_____

☐ Parole or release continued

☐ Effective _____

_____

☐ Effective when plans are approved

☐ Found not to be a violator

☐ Hearing continued to _____

☐ For further information
☐ At inmate's request
☐ For Violation Report
☐ Recommendation No. _____
☐ Special Condition No. _____

_____

☐ Order of _____

☐ Amended
☐ Stayed
☐ Vacated

☐ Warrant withheld

☐ Warrant withdrawal request

☐ Granted
☐ Denied

☐ Statutory Parole

☐ Release by statute

☐ Considering all factors of your case, it is the judgment of the Board that parole is warranted.

☒ See Addendum attached to and made a part of this Order

The Board, considering all factors in your case, is denying parole at this time because of one or more of the following statutory reasons:

☐ There is a substantial risk that you will not conform to the reasonable conditions of parole, based upon one or more of the following reasons:

- ☐ Existence of prior adult felony convictions.
- ☐ An apparent pattern of aggressive or assaultive behavior (misdemeanor offenses also considered).
- ☐ Prior adult parole or probation violations within five years prior to offense.
- ☐ Refusal to be supervised on parole.
- ☐ Inadequate parole plan.

☐ Your release would deprecate the seriousness of the offense or promote disrespect for the law, based upon one or more of the following factors:

- ☐ The offense for which you were convicted, _____
- ☐ The aggravating as well as mitigating circumstance as described by statute.

☐ Your release would have a substantially adverse effect on institutional discipline based upon one or more of the following factors as established by the finding of an Administrative Review Board:

- ☐ Physical attack on another inmate or institutional staff.
- ☐ Possession of weapons or drugs.
- ☐ Repeated violations of major institutional rules.
- ☐ Committed an act prohibited by law.

Violator Rationale

Parole or release is violated because you:

- ☐ Were convicted of (charged with) _____
  _____
- ☐ Violated condition(s) _____
  _____
  of your Parole or Release Agreement
- ☐ Violated condition(s) _____
  _____
  of your Special Order
- ☐ Absconded
- ☐ Possessed ☐ Delivered
  - ☐ A controlled substance
  - ☐ A weapon
- ☐ Did not comply with your counselor's instructions to
  _____
- ☐ Failed to report or falsified report(s)

Evidence Relied Upon

- ☐ Counselor's Report
- ☐ Police Report
- ☐ Testimony or reports of witnesses
- ☐ Own admission

☐ See Addendum attached to and made a part of this Order

For The Board

[Signatures omitted in printing.]

RATIONALE

August 16, 1982

William Heirens **Vienna C-06103**

The Board, having heard your case, reviewed the written material in your file which included a statement from the prosecutor, your institutional record, and the representation made by you at the hearing at Vienna Correctional Center.

In considering the crimes for which you are now serving time, the Board notes that you were convicted of three murders in which the bodies were dismembered. Furthermore, you stated that you obtained sexual satisfaction from committing these and other burglaries in which three of the victims were murdered.

This behavior was precipitated by unknown factors, thus rendering at best your behavior in an unstructured environment difficult to predict.

The Board in rendering its decision to deny parole considered all the above factors but feels there is a risk of further nonconforming conduct too great to allow your release at this time.

The foregoing rationale is substantially the same reasoning that led to the denial of your parole in 1979 and other recent years.

We take note of your excellent institutional adjustment in a structured environment and encourage you to continue in the same manner.